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In The

Supreme Court of the United States

October Term, 1995

HARRY ROBINSON, KAY ROBINSON, EVA MAY McCARTHY, and GEORGE SAMUEL ROBINSON,

Petitioners,

v.

AUDI AKTIENGESELLSCHAFT f/k/a AUDI NSU AUTO UNION AKTIENGESELLSCHAFT, and VOLKSWAGEN OF AMERICA, INC.,

Respondents.

AND

HARRY ROBINSON, KAY ROBINSON, EVA MAY McCARTHY and GEORGE SAMUEL ROBINSON,

Petitioners,

v.

VOLKSWAGENWERK AG and HERZFELD & RUBIN, P.C.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

There is a conflict among the circuits on what state of mind must be proven in order to establish "fraud on the court" sufficient to set aside a federal diversity judgment and whether a claim in common law fraud lies without first setting aside the fraudulently-obtained judgment. In this case, the Tenth Circuit Court of Appeals imposed an unduly stringent standard upon petitioners, who seek both direct relief against the perpetrators and to set aside a judgment upon a showing that an officer of the court lied to the trial court in regard to dispositive evidentiary facts. Taken together, the two Court of Appeals opinions preclude any relief in the absence of proof of the officer's specific intent to deceive the court. The questions presented are:

1. Did the court below err when it held that the remedy for fraud upon the court sufficient to set aside a federal diversity judgment cannot be predicated upon a showing of reckless disregard for the truth but must meet a much more exacting standard of proof "that Defendants' counsel was involved in a 'deliberately planned and carefully executed scheme' to defraud the court through misrepresentation and nondisclosure?"

2. Can a suit for common law fraud for fraudulently procuring a federal judgment by false answers to interrogatories and fraudulent misrepresentations and omissions to a federal judge be maintained without first having the federal judgment itself set aside or without complying with the standards imposed for showing fraud on the court sufficient to set the judgment aside?

LIST OF PARTIES

Harry Robinson

Kay Robinson

Eva May McCarthy

George Samuel Robinson

Audi Aktiengesellschaft, f/k/a Audi NSU Auto Union Aktiengesellschaft

Volkswagen of America, Inc.

Volkswagenwerk AG

Herzfeld & Rubin, P.C.

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OPINIONS BELOW

The opinions in the court below are reported as follows:

1. Robinson v. Audi Aktiengesellschaft, 56 F.3d 1259 (10th Cir. (Okla.) May 30, 1995) (No. 92-5238), reprinted in the Appendix, *infra*, at 1 [APP. *at* 1].

2. Robinson v. Volkswagenwerk AG, 56 F.3d 1268 (10th Cir. (Okla.), May 30, 1995) (No. 93-5168), reprinted in the Appendix, *infra*, at 23 [APP. *at* 23].

The opinions of the United States District Court are contained in the Appendix at 38 and 48 [APP. *at* 38 & 48].

JURISDICTION

The trial court had jurisdiction over both cases pursuant to 28 U.S.C. § 1332. On appeal the United States Court of Appeals for the Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and judgment was entered in both cases on May 30, 1995. In August, 1995, Mr. Justice Breyer granted additional time to file this petition for certiorari until October 23, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Rule 60(b) of the Federal Rules of Civil Procedure provides: Mistakes; Inadvertence; Excusable Neglect;

Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE[1]

This petition asks the Court to resolve a conflict among the circuits, explicitly recognized by the court

[1] References to the Appellants' Appendix in the court below will be signaled as [APLT.APP. *at* ___] and references to the APPENDIX, *infra*, as [APP. *at* ___].

below, over the standard of proof required to establish fraud on the court based on in-court statements that the trial judge determined to be critical to his rulings in the first case and the standard of proof required to sustain a common law fraud suit for fraudulently procuring a federal judgment. Although there are two separate cases and opinions below – one involving the claims against the original defendants and the other against the law firm whose attorneys made the false statements and an additional company that also directly profited from such statements - the Court of Appeals below applied the same stringent standard of proof and affirmed the dismissal of suit for common law fraud as a pleading matter without a jury trial. The questions raised in both cases are so intricately intertwined that certiorari should be granted in both.

According to the rulings below, there is no judicial remedy against the perpetrators of fraud on the court until the judgment obtained by the fraud be set aside upon a showing that the lawyer who lied did so as an integral part of a deliberate scheme to defraud unless the fraud is discovered and a motion under Rule 60(b)(3) filed within one year. In reaching that conclusion, the trial court and the Court of Appeals applied a legal standard requiring a specific intent or scienter usually associated with acts of criminality.

This case involves crucial factual misrepresentations and fraudulent omissions made to the trial court regarding a dispositive document which led to its inadmissibility in a trial in the Northern District of Oklahoma in 1981. In an earlier appeal the Tenth Circuit Court of

Appeals held that "the failure to admit this most compelling evidence of prior knowledge was prejudicial to plaintiffs." *Robinson v. Audi NSU Auto Union Aktiengesellschaft*, 739 F.2d 1481, 1489 (10th Cir. 1984).

The misrepresentations and omissions were specifically designed to suppress the role of the primary defendant, Volkswagenwerk AG (VWAG hereafter), the author of the "compelling evidence," in the design and production of and the profit from the Audi 100 LS automobile. The fraud was successful and the role of VWAG in the development of the Audi 100 was successfully hidden from view until the plaintiffs discovered the truth in 1986 and then brought this lawsuit.

THE PROCEEDINGS BELOW

1. The Underlying Products Liability Action

Plaintiffs were severely burned in an automobile accident in 1977. The car in which they were traveling, a 1976 Audi 100 LS, burst into flames after being rear-ended by another car. Plaintiffs filed a products liability suit in an Oklahoma state court alleging that their injuries were caused by defective design and placement of the Audi 100 LS's gas tank and fuel system. Volkswagen of America, Inc. (VWoA hereafter), the importer of the Audi 100 LS was named as a defendant in the case, as were the regional distributor and the retailer of the car. VWAG was initially named as a defendant.

When VWAG received in the mail a copy of the state court petition naming it as a defendant, it immediately

contacted its United States lawyers, Herzfeld & Rubin (H&R hereafter). H&R, acting through Myron Shapiro, immediately telephoned Oklahoma local counsel and told them that VWAG had nothing t do with the case. VWAG's local counsel called plaintiffs' counsel and told him that VWAG was the wrong defendant and that the proper defendant was Audi NSU, which manufactured the automobile. Based on this information, plaintiffs' counsel substituted Audi NSU as the defendant in place of VWAG.

After extensive jurisdictional disputes, including an opinion by the Oklahoma Supreme Court, this Court granted certiorari to review the question of personal jurisdiction. After this Court's decision in *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), the remaining defendants, VWoA and Audi NSU (which had been substituted for VWAG), removed the case to the Northern District of Oklahoma where the matter was set for trial against them alone.

2. The Ruling on the Admissibility of the NHTSA Documents in the Underlying Products Liability Trial.

The case was tried to a jury in the U.S. District Court. At the outset of the trial, a dispute arose whether certain documents submitted to the National Highway Traffic Safety Administration (NHTSA hereafter) on behalf of VWAG could be introduced into evidence. The defendants filed a Motion in Limine to preclude their admission, stating that the admission of such documents would

cause them "irreparable harm." The basis for their argument in the motion for the exclusion of the evidence was, "[VWAG] had nothing whatever to do with the design, manufacture or sale of the subject Audi 100 LS." [APLT.APP. *at* 696.]

Judge Ellison initially ruled that the evidence was admissible. [APLT.APP. *at* 595-96.] Mr. Shapiro asked to make a record. [APLT.APP. *at* 598.] Mr. Shapiro had assured the court that, because H&R was the United States counsel for both VWAG and Audi, he had special and actual knowledge of the facts regarding the relationship between the two entities.[2]

Since there were factual determinations upon which the relevancy of the documents depended and factual questions with respect to whether the clear admissions of VWAG would be attributed to the named defendants,

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[2] "Your Honor, would I be out of line, sir, to make one statement for the record?" [The Court: You may make a statement for the record.] "Thank you, Your Honor. And to the point that Mr. Greer was addressing. Your Honor, I am very familiar with the activities of my firm's clients, Volkswagen of America Inc., Audi Nsu [sic] Auto Union and also the manufacturer of Volkswagen vehicles, Volkswagen Aktiengesellschaft located in Germany." [APLT.APP. *at* 532.]

On November 24, 1981, Mr. Shapiro represented to the court: "Because of my relationship as United States counsel to the manufacturer of Volkswagen vehicles, I am obviously privy to and familiar with the various dealings in the representation of that client and also Volkswagen of America, and various submissions and comments that are made to the National Highway Traffic and Safety Administration." [APLT.APP. *at* 616.]

Judge Ellison, in accordance with Federal Rules of Evidence, Rule 104, made the factual determination regarding the relationship upon which the admissibility of the documents depended. Mr. Shapiro made factual representations which he assured the court were made with the understanding of his role as an officer of the court.[3]

Based on the factual representations made by Mr. Shapiro, Judge Ellison reversed his ruling and denied the admissibility of the documents. In that ruling he specifically stated his reliance upon Mr. Shapiro's false representations regarding the relationship between VWAG and Audi NSU. [APLT.APP. *at* 624-25.] The jury subsequently returned a verdict in favor of Audi NSU and VWoA.

3. The Reversal in the Tenth Circuit and the Subsequent Change in the Oklahoma Products Liability Law.

On appeal, the Tenth Circuit affirmed the verdict as to Audi NSU, but reversed as to VWoA. One of the documents that had been successfully excluded before Judge Ellison provided that, "[p]uncture resistance of the fuel tank is only important if the tank is located inside the trunk of the vehicle. Pieces of luggage or tools with sharp edges can locally penetrate the tank." 739 F.2d at 1488. The Court of Appeals characterized that document as showing that VWoA knew the gas tank eventually used in the 1976 Audi 100 LS "contained an inherent risk of

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[3] "But everything that I have represented to Your Honor has been represented as an officer of the court as a fact with respect to the importer agreement or anything else. . . . " [APLT.APP. *at* 556.]

combustion when impacted from behind." 739 F.2d at 1486. It characterized this document as "this most compelling evidence of prior knowledge." 739 F.2d at 1489. But on the record before it, the court held that there was no showing that VWoA, who did know of the VWAG NHTSA submissions, was an agent of Audi NSU and, therefore, the document was not admissible against Audi NSU. The court concluded that the documents were of such probative value that a failure to admit them in the jury trial required a reversal of the judgment in favor of VWoA. VWoA was then the only party of record to which knowledge of the VWAG document could be attributed. It ordered a new trial against VWoA. 739 F.2d at 1487-89. At the same time, in what turned out to be its most significant ruling, the court held:

> "Because the statements were not made 'during the existence of the relationship,' Volkswagen's statements are not admissible against Audi as admissions by a party opponent. As to Audi, the statements are inadmissible hearsay and were properly excluded below." [739 F.2d 1481, 1487.]

Audi NSU's judgment was thus affirmed. This holding, it turns out, was based upon the fraudulently-withheld facts regarding the relationship that the original trial judge has now found made the document not hearsay. [APP. *at* 47.] This is the factual core of this petition to this Court.

Before the new trial commenced, however, the Oklahoma Supreme Court decided *Braden v. Hendricks*, 695 P.2d 1343 (Okla. 1985). On a motion for summary judgment, the trial court held that, "*Braden* held that a distributor is automatically exonerated in a strict liability action

alleging a manufacturing defect if the automobile manufacturer is absolved." Pursuant to that case, and on the basis of the fraudulently-obtained judgment in favor of Audi, the trial court granted summary judgement in favor of VWoA. The Tenth Circuit affirmed, *Robinson v. Volkswagen of America*, 803 F.2d 572 (10th Cir. 1986).

4. The Discovery of the Fraud and the Cases Sought to Be Reviewed by This Petition

Plaintiffs obtained new counsel, a federal jurisdiction professor at the University of Arizona College of Law who had been interested in the issues raised in *World-Wide Volkswagen v. Woodson*. In pursuing that interest, he had met the plaintiffs. At a previous time, he had been a Volkswagen dealer in Indiana and had some information that VWAG and Audi NSU were closely related. This snippet of information led to an investigation of facts, including a trip to Germany and information which led to the filing of the two lawsuits which are the subject of this petition.

In the one of these two suits (No. 92-5238 in the Tenth Circuit, [APP. at 1]), petitioners sued Audi NSU and VWoA to set aside the judgment in favor of those defendants by way of an independent action under the savings clause of Rule 60(b) of the Federal Rules of Civil Procedure. Plaintiffs claimed that Mr. Shapiro, the defendants' lawyer in the underlying case, made false and misleading representations to the court and omitted to state the material facts necessary to make the statements he made to the court not misleading. These misstatements and material omissions formed the factual basis for the

denial of admissibility of the submissions made to NHTSA. Plaintiffs also alleged that, had the true facts been known, and not suppressed, the documents would have been admitted and that Mr. Shapiro, in connection with the argument before the trial court, had made false and misleading statements respecting that relationship (the relationship of VWAG and Audi NSU) and had done so knowing that he did not know whether what he was saying was true or not.

After a bench trial, the judge who had presided at the original trial issued a written opinion. He found that had he known the facts now before him at the time of the underlying products liability trial, the NHTSA submissions "would most assuredly have been admitted into evidence," and that VWAG would have been joined as a defendant. [APP. *at* 47.] The trial court did not make any finding or any discussion concerning fraud generally, but limited his inquiry to the Rule 60(b) savings clause issue of "fraud upon the court." [APP. *at* 42.]

The trial judge thereupon adopted a very exacting standard for proof of fraud:

> "However, **nowhere** in this meticulously prepared and effectively argued claim **does there appear clear and convincing evidence that Defendants' counsel was involved in a 'deliberately planned and carefully executed scheme' to defraud this Court through misrepresentation and nondisclosure. In the absence of such evidence, the Court is bound by the relevant case law to deny Plaintiffs' Motion.** This case is, accordingly, dismissed." [APP. *at* 47 (emphasis added).]

The Court of Appeals affirmed, holding:

> " . . . the district court found no evidence that defendants' counsel was involved in a ' "deliberately planned and carefully executed scheme" to defraud this Court through misrepresentation and nondisclosure.' We see nothing improper in the district court's dismissal of the complaint upon making this finding. As our previous discussion indicates, fraud on the court requires an intent to deceive or defraud the court." [APP. *at* 20.]
>
> " . . . We think it clear that 'fraud on the court,' whatever else it embodies, requires a showing that one has acted with an intent to deceive or defraud the court. A proper balance between the interests underlying finality on the one hand and allowing relief due to inequitable conduct on the other makes it essential that there be a showing of conscious wrongdoing – what can properly be characterized as a deliberate scheme to defraud – before relief from a final judgment is appropriate under the *Hazel-Atlas* standard." [APP. *at* 19.]

This is the standard that is wrong. This is the standard that is in direct conflict with the Sixth Circuit, as was explicitly acknowledged by the court below [APP. *at* 18], and with the Third Circuit in *Averbach v. Rival Mfg. Co.*, 809 F.2d 1016 (3rd Cir. 1987) and 879 F.2d 1196 (3rd Cir. 1989). Certiorari should be granted to review it.

In the other case (No. 93-5168 in the Tenth Circuit [APP. *at* 23]), the Robinsons assert claims for common law fraud against VWAG and its lawyers, H&R, and against VWAG for negligence, product liability and breach of warranty. Neither of these defendants were parties at the

time the judgment in the underlying case was entered. Both of these defendants were the perpetrators of the fraud.

The common law fraud included the representations and omissions made by Mr. Shapiro to the trial court, and also involved false and misleading answers to interrogatories that concealed the true connection of VWAG with Audi NSU and its predecessor as related to the Audi 100 automobile, and suppressed the identity of witnesses and employees who knew the true relationship. It alleged that the fraud caused the failure to admit the key NHTSA submissions and that, had the document come into evidence, that liability would have been established. A jury trial was demanded.

The complaint survived pleading motions. After the trial in the action to set aside the judgment against Audi NSU and VWoA, the trial court, *sua sponte*, dismissed the complaint in this case. It held that the sole remedy for common law fraud was Rule 60(b), and that the one-year statute of limitations relating to Rule 60(b)(3) fraud, misrepresentation or other misconduct, barred the claim. The Court of Appeals held that the district court was incorrect in stating that any request for relief from the judgment was barred by the one-year limit placed on motions under Federal Rule of Civil Procedure 60(b). Nevertheless, it affirmed the dismissal on a different basis. The Court of Appeals held that the jury verdict in favor of Audi NSU in the underlying product liability suit barred plaintiffs' claims under the doctrine of collateral estoppel or issue preclusion.

> "Each of these claims of damages rests upon an unstated but common foundation: they would require plaintiffs to show that, but for the alleged fraud leading to the exclusion of the NHTSA documents, the jury would have found in the plaintiffs' favor. But to show this, plaintiffs would in turn have to establish that the Audi 100 LS gas tank was in fact defective; that it was unreasonably dangerous; and that it was the cause of the plaintiffs' injuries in the accident. Thus, plaintiffs claims of damages for fraud are based upon assertions of fact that are **inconsistent with the facts supporting the prior judgment.**" [APP. *at* 31 (emphasis added).]

The "prior judgment" to which the court referred is the same judgment that plaintiffs claim was obtained by fraud. We asserted there, and submit here, that the fraudulent suppression of the very evidence which prevented the admissibility of the NHTSA submissions and deprived petitioners of a trial with evidence showing that the gas tank "contained an inherent risk of combustion when impacted from behind" and "most compelling evidence of prior knowledge," also deprived them of the "full and fair opportunity" to litigate this issue in the prior trial, and thus precludes the operation of collateral estoppel to prevent petitioners from proving precisely what the evidence fraudulently suppressed shows. The court below, almost as an aside, then held that the widely recognized "full and fair opportunity" exception to the preclusion rules is nothing more than another form of independent action and must therefore meet the stringent standard of proof it had applied to fraud upon the court. [APP. at 33, note 5.] The effect of all of these rulings together is to prevent remediation of fraud by an officer

of the court except upon the most exacting proof of intentional and scheming fraud and deceit.

REASONS FOR GRANTING THE PETITION

I.

THERE IS DIRECT CONFLICT BETWEEN THE DECISIONS BELOW AND RECENT DECISIONS IN THE UNITED STATES COURTS OF APPEAL FOR THE THIRD AND SIXTH CIRCUITS.

There is a direct conflict between the Tenth Circuit's opinion in No. 92-5238 and the recent Sixth Circuit case of *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993), cert. denied, ___ U.S. ___, 115 S.Ct. 295 (1994). There is a direct conflict between the Tenth Circuit's opinion in No. 93-5168 and the two Third Circuit cases of *Averbach v. Rival Mfg. Co.*, 809 F.2d 1016 (3rd Cir. 1987) and 879 F.2d 1196 (3rd Cir. 1989).

The Tenth Circuit acknowledged the conflict in No. 92-5238 when it applied its more rigid standard for showing fraud on the court sufficient to set aside a judgment by an independent action. It affirmed the District Court's opinion requiring clear and convincing evidence that "Defendants' counsel was involved in a 'deliberately planned and carefully executed scheme' to defraud this Court through misrepresentation and nondisclosure." The Tenth Circuit, in this case, required a specific "intent to deceive or defraud the court" and rejected the Third Circuit's less stringent "reckless disregard for the truth." The court said:

"As we noted previously, plaintiffs' assertion of error appears to be based on the view that the district court misunderstood the element of scienter required for fraud on the court. Few courts have addressed what, if any, specific mental state must be shown in order to characterize a false representation to the court as a 'fraud upon the court' sufficient to set aside a judgment. As plaintiffs point out, the Sixth Circuit recently held that 'a scheme based on a subjective intent to commit fraud' is not required because 'reckless disregard for the truth is sufficient.' *Demjanjuk v. Petrovsky*, 10 F.3d 338, 353 (6th Cir. 1993), *cert. denied*, 115 S.Ct. 295 (1994). Other courts seem to have taken a more restrictive view, stating that a fraud on the court occurs 'where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense.' *See Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989). *See also Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978) (quoting *England v. Doyle*, 281 F.2d 304, 310 (9th Cir. 1960) ('[I]t is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision.') *Cf. In Re Laing*, 945 F.2d 354, 357-58 (10th Cir. 1991)." [APP. *at* 18-19.]

In addition to the Sixth Circuit decision in *Demjanjuk v. Petrovsky*, and the cases cited by the Tenth Circuit

above, the Third Circuit in *Virgin Islands Housing Authority v. David*, 823 F.2d 764 (3rd Cir. 1987) and *Averbach v. Rival Mfg. Co.*, 809 F.2d 1016 (3rd Cir. 1987), held that common law fraud by an officer of the court is sufficient. In *Susan R. Pumphrey v. K. W. Thompson Tool Co.*, 62 F.3d 1128, (9th Cir. 1995), the Ninth Circuit held that fraud upon the court occurs when an "officer of the court" perpetrates fraud affecting the ability of the court or jury to impartially judge a case.

At the hearing in the trial court, petitioners made out a prima facie case of "reckless disregard" of the truth by an officer of the court in regard to assertions of fact regarding VWAG's relationship to the Audi 100 automobile. There is no question that the fraud here was committed by an officer of the court or that its effect was to deprive the plaintiffs of their right to present their "most compelling" evidence to the jury. The trial judge has now held that, if he had known the truth, the dispositive documents would have been admitted. The fraud clearly foreclosed full and fair preparation of the plaintiffs' case, was committed by an officer of the court and affected the ability of the jury to impartially judge the case. The court below, however, adopted the most restrictive standard requiring the highest level of scienter or intent, specifically rejecting the holding in *Demjanjuk*:

> "We think it clear that 'fraud on the court,' whatever else it embodies, requires a showing that one has acted with an intent to deceive or defraud the court. . . . " [APP. *at* 19.]

and on that basis affirmed the District Court's stringent view of the requirement of *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944). Because the court

viewed the *Hazel-Atlas* facts as the irreducible minimum threshold for invocation of the court's inherent power, there is no finding in regard to any of the alternatives. Whether the statements were made with reckless disregard for truth, gross negligence, or some other standard, was not determined by the trial court. All that is here are the facts that: 1) the misrepresentation caused the trial court to make a decision it would not have made if the truth had been told; 2) the error was so fundamental that a new trial had been ordered by the Court of Appeals on earlier appeal; 3) the misrepresentation was made by the lawyer directly to the court; 4) that the matter at issue went to the core functioning of the judicial process; and, 5) the finding that there is not "clear and convincing" evidence that defendants' counsel was involved in a "deliberately planned and carefully executed scheme" to defraud the District Court.

The Tenth Circuit Court of Appeals concluded that the plaintiffs could not pursue their claims for damages for common law fraud without first obtaining relief from the judgment. But in a classic "Catch 22," the court held that the collateral estoppel effect of the first judgment precludes the common law fraud suit, notwithstanding the precise allegations of fraud it had previously determined stated a claim for relief against an officer of the court. *Robinson v. Volkswagenwerk AG*, 940 F.2d 1369 (10th Cir. 1991); cert. denied sub nom, *Herzfeld & Rubin v. Robinson*, 502 U.S. 1091 (1992).

There is a direct conflict between the Tenth Circuit's opinion in No. 93-5168 and the two Third Circuit cases of *Averbach v. Rival Mfg. Co.*, 809 F.2d 1016 (3rd Cir. 1987) and 879 F.2d 1196 (3rd Cir. 1989). In *Averbach*, the plaintiff

had previously brought a products liability action in a federal court invoking the court's diversity jurisdiction. It alleged that a design defect in an electric can opener caused a home fire. The case was tried before a jury and a verdict entered in favor of the defendant. No appeal was taken. In the course of that case, the plaintiff propounded an interrogatory respecting any complaints of a similar occurrence. The defendant answered that there had been one such claim which proved to be not meritorious.

The plaintiff filed a motion for a new trial under Rule 60(b), alleging he had received information showing that the defendant had falsely answered the interrogatory. The District Court denied the motion because it was not filed within one year after the judgment, as required under F.R.C.P. 60(b)(3).

Nearly four years after the verdict, plaintiff filed a new complaint, alleging that answers to the interrogatories were false, and that, had truthful answers been given, the presentation to the jury would have been much stronger and could have provided a different verdict. The trial court dismissed the complaint on the grounds that the complaint failed to state a claim for relief. The Court of Appeals reversed, holding that the trial could proceed on the claim of common law fraud and that no requirement of showing "fraud on the court" existed. A jury trial was had, the court instructing on the elements of common law fraud and a verdict entered in favor of the plaintiff. The trial court granted the defendant's motion for judgment notwithstanding the verdict. The Court of Appeals reversed, affirming the verdict for common law fraud. *Averbach* is simply on all fours with No. 93-5168. In another context, this Court has emphasized the difficulty

of proving scienter in fraud cases. *Herman & MacLean v. Huddleston,* 459 U.S. 375, 390 (1983). The standards adopted by the Tenth Circuit build an nearly impenetrable barrier to remedies against anyone who commits fraud upon the court or upon a party to a lawsuit.

Certiorari should be granted to resolve conflicts in the circuits.

II.

THIS COURT HAS NOT VISITED THE STANDARDS REQUIRED TO SHOW "FRAUD ON THE COURT" NECESSARY TO SET ASIDE A FEDERAL DIVERSITY JUDGMENT FOR 50 YEARS. THE CIRCUIT COURTS HAVE SUBSEQUENTLY WRESTLED WITH WHAT THE COURT MEANT IN 1944. THE TIME IS RIPE FOR GUIDANCE FROM THIS COURT.

This Court has recently reaffirmed the inherent power, "'firmly established in English practice long before the foundation of our Republic,' to set aside a judgment whose enforcement would work inequity." *Plaut v. Spendthrift Farm, Inc.*, ___ U.S. ___, 115 S.Ct. 1447, 1460 (1995); and see, *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991). One of the rubrics under which this power has been exercised since *Hazel-Atlas Glass Co. v. Hartford-Empire Co., supra,* has been "fraud on the court." During the fifty years since *Hazel-Atlas* was decided, the lower federal courts have spoken with many voices as to what "fraud on the court" means and what must be shown as a predicate to the exercise of the inherent judicial power. It has been reflected upon and spoken about by nearly all

the circuits. The many different formulations are collected in 11 Wright & Miller, Federal Practice and Procedure § 2870 (Rule 60). See, also, 7 Moore's Federal Practice § 60.33 (1985). The time is ripe for this Court to speak to this important matter and provide a clear standard which will apply uniformly.

III.

THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO MAKE CLEAR THE DUTY OF CANDOR REQUIRED DURING ARGUMENT TO THE COURT.

In recent years there has been much concern regarding discovery practice and the ethical obligation of lawyers to the court. This case is a paradigm example of what has been called "junk yard dog" discovery practice. But it is also an example of a problem that has surfaced in several circuits in the last few years. Here a self-proclaimed officer of the court abused that position to hide crucial facts from the court itself – facts relating to the administration of justice. He asked the trial judge to rely upon the mutual trust that must exist between court and counsel, and then he breached that trust by providing the court with false information that he either knew was false or whose truth he recklessly disregarded.

What is most disturbing is that the breach of candor in this case does not stand alone. *Susan R. Pumphrey v. K. W. Thompson Tool Co.*, 62 F.3d 1128 (9th Cir. 1995), *U.S. v. Shaffer Equipment Co.*, 11 F.3d 450 (4th Cir. 1993), and *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993), cert. denied, ___ U.S. ___, 115 S.Ct. 295 (1994), all involve cases where an officer of the court has made misrepresentations

that fundamentally diverted the judicial process. That such breaches of the duty of candor and truth could occur so often in so many different circuits in such a short time period must give pause, and suggest a need for this Court to speak regarding the limits of zealous advocacy and the duty of candor to the court.

Petitioners submit that there is no more fundamental and important requirement for the effective and fair functioning of the federal system than the requirement of candor to the court. In *Shaffer*, the United States Court of Appeals for the Fourth Circuit said:

> " . . . it is important to reaffirm, on a general basis, the principle that lawyers, who serve as officers of the court, have the first line task of assuring the integrity of the process. Each lawyer undoubtedly has an important duty of confidentiality to his client and must surely advocate his client's position vigorously, but only if it is truth which the client seeks to advance. The system can provide no harbor for clever devices to divert the search, mislead opposing counsel or the court, or cover up that which is necessary for justice in the end. It is without note, therefore, that we recognize that the lawyer's duties to maintain the confidences of a client and advocate vigorously are trumped ultimately by a duty to guard against the corruption that justice will be dispensed on an act of deceit. See 1 Geoffrey C. Hazard, Jr. and W. William Hodes, The Law of Lawyering 575-76 (1990) ('[W]here there is danger that the tribunal will be misled, a litigating lawyer must forsake his client's immediate and narrow interests in favor of the

> interests of the administration of justice itself.')." [11 F.3d at 457-58.]

This Court, in recognition of the problems created by unfettered zealous advocacy, has responded by promulgating new rules that are designed to ensure the open exchange of information prior to trial. The expectation is, of course, that the trial judges will primarily enforce the rules with appropriate sanctions. This may be adequate if the matter is discovered before judgment is entered. Here, the effect of the two opinions of the Court of Appeals will be most pernicious if left unchallenged. What these two decisions, read in tandem, say is that an officer of the court can recklessly lie to a federal judge about important evidentiary facts and, if he does not get caught within a year, his victims have no remedy. It is rare, indeed, that any appeal can be completed during a single year and during the appeal the trial court has no jurisdiction. The existence of such a rule cannot help but promote the very kind of sharp practice that this Court has sought to discourage by its articulated policy regarding discovery practice.

The Tenth Circuit does not exist in a vacuum and these two decisions will work their evil in many ways. They cannot help but encourage dishonesty and lack of candor in the processing of cases in the federal courts. A fundamental foundation of the fair and effective trial process in the United States District Courts is the duty of the trial lawyer to be scrupulously candid with the court, particularly in regard to matters that relate to the essential functions of the court. This case presents facts upon which this Court can draw a focused and clear line regarding the duty of candor by an officer of the court.

There is no dispute that the lawyer told the court: 1) that he was aware of his obligations as an officer of the court; 2) that VWAG had "nothing whatever to do" with the Audi 100 automobile; and 3) that the preceding statement was false in material and significant respects. There is no dispute that the trial judge relied upon those statements. And finally, as noted above, the District Court specifically held:

> "that had it been appraised of the material contained in Plaintiffs' Proposed Findings of Fact and Conclusions of Law (FF/CL) filed July 27, 1992 at pp. 38-42 (nos. 53-55) the submissions exhibits at issue would most assuredly have been admitted into evidence. Indeed, it seems fair to say that if the relevant corporate relationships set forth in Plaintiffs' FF/CL, cited above had been on record, VWAG would have been joined as a party defendant. [APP. *at* 47.]

The District Court nonetheless applied an extremely rigorous standard of proof and denied relief solely because it could not find clear and convincing proof that the lawyer was involved in an intentional scheme and plan to defraud or deceive the court. The Court of Appeals affirmed and specifically rejected the standard adopted in other circuits in regard to the issue of the kind of intent or scienter required in cases where lawyers make materially false statement of fact or make material omissions of fact to the trial court in regard to matters that go directly to the core of the judicial process. It is important for this Court to act to reaffirm the limits of "zealous" advocacy in the federal system.

The crisis of confidence in the American court system is reflected in the fact that much of the judicial authority for changing the standard for proof of fraud upon the court comes from the most recent cases. This Court has issued a ringing denunciation of litigation tactics that lead to this kind of misconduct. *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991). But, if the opinion of the court below is correct, there is no effective remedy for the misconduct except in the most outrageous, egregious and extremely rare cases. The recent opinion of the Sixth Circuit in *Demjanjuk v. Petrovsky, supra,* stands in stark contrast to that standard and reflects an awareness of the need for the courts to change rules to reflect the concerns of current judicial administration. This Court should grant certiorari to resolve the conflict among the Courts of Appeal in regard to this important issue of judicial administration and professional integrity.

CONCLUSION

Petitioners respectfully request that this Court issue a writ of certiorari directed to the United States Court of Appeals for the Tenth Circuit in both of the cases below.

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

HARRY ROBINSON AND KAY ROBINSON; EVA MAY McCARTHY; and GEORGE SAMUEL ROBINSON,	)	No. 92-5238
Plaintiffs-Appellants,	)	
v.	)	
AUDI AKTIENGESELLSCHAFT, f/k/a AUDI NSU AUTO UNION AKTIENGESELLSCHAFT, a foreign corporation; VOLKSWAGEN OF AMERICA, INC.,	)	
Defendants-Appellees.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 88-C-367-E)
(Filed May 30, 1995)

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Richard M. Eldridge, Rhodes, Hieronymus, Jones, Tucker & Gable, Tulsa, Oklahoma (John H. Tucker, of the same firm, and Herbert Rubin and Daniel V. Gsovski, Herzfeld

& Rubin, P.C., New York, New York, with him on the brief), for defendants-appellees.

Before EBEL and KELLY, Circuit Judges, and BROWN, District Judge.*

BROWN, District Judge.

This is an appeal from an order denying plaintiff's request to set aside a judgment. The judgment in question resulted from a jury verdict in defendants' favor on plaintiffs' product liability claims. After that judgment was affirmed on appeal, plaintiffs filed a complaint in the district court alleging that the defendants had obtained the judgment by means of a fraud upon the court. Pursuant to Fed.R.Civ.P. 60(b), the district court held a bench trial on the allegations and, after hearing the evidence, concluded that plaintiffs had failed to prove such fraud. Plaintiffs now contend that the district court's ruling was flawed. We exercise jurisdiction under 28 U.S.C. § 1291 and, for the reasons set forth herein, we affirm.[1]

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* The Honorable Wesley E. Brown, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

[1] This appeal is closely related to the separately filed appeal in *Robinson v. Volkswagenwerk AG*, No 93-5168 (10th Cir. April, 1995).

I. History of the Litigation.

An understanding of the plaintiffs' allegation of fraud on the court requires a review of the eighteen-year history of this litigation. The plaintiffs were injured in an automobile accident on an Oklahoma highway in 1977. The car in which they were traveling, a 1976 Audi 100 LS, was struck from behind by a Ford Torino being operated by a drunk driver. The Ford was going approximately 90 miles per hour at the time of the crash, while the plaintiffs' car was going an estimated 55 miles per hour. The impact of the collision crushed the rear end of the Audi up to twenty-four inches, and the doors of the car were jammed shut. The impact also punctured the Audi's fuel tank, called a "drop-in" type, which was located in the back of the car and which served as the floor of the trunk. The Audi burst into flames from the collision, and the plaintiffs were severely burned.

Plaintiffs brought an action in the District Court for Creek County, Oklahoma, claiming that their injuries resulted from defective design and placement of the Audi's gas tank and fuel system. The initial named defendants included the vehicle's importer, Volkswagen of America, Inc., as well as the regional distributor and the retailer of the car. An amended petition named Volkswagenwerk Aktiengesellschaft (hereinafter "Volkswagen AG"), a German company, as the manufacturer of the vehicle. Plaintiffs subsequently substituted Audi NSU Auto Union Aktiengesellschaft (hereinafter "Audi" or "Audi NSU"), a subsidiary of Volkswagen AG, for Volkswagen AG, stating that through interrogatories they had learned that Audi was the manufacturer of the vehicle. Aple. Supp. App. at 804. It is undisputed that this

substitution was made after a lawyer for one of the defendants informed plaintiffs' counsel that Audi NSU rather than Volkswagen AG was the manufacturer. A jurisdictional dispute was eventually decided by the United States Supreme Court, which held that personal jurisdiction was lacking over the regional distributor and the retailer, *see World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980), and those defendants were dismissed from the case. The remaining defendants, Audi NSU and Volkswagen of America, removed the action to the U. S. District Court for the Northern District of Oklahoma, where the claims were tried to a jury.

In the course of the jury trial, plaintiffs attempted to admit into evidence certain documents that Volkswagen of America had submitted to the National Highway Traffic Safety Administration (NHTSA) on behalf of Volkswagen AG between 1967 and 1974. The documents indicated that Volkswagen of America and Volkswagen AG were aware at the time the submissions were made that a car with a fuel system of the type later used in the 1976 Audi LS 100 carried a risk of combustion when impacted from behind. The defendants challenged the admissibility of this evidence, and the district court heard extensive arguments on the issue. Counsel for Audi argued, among other things, that the submissions were made on behalf of Volkswagen AG and were therefore irrelevant to the claims against Audi. In a memorandum in support of Audi's motion in limine, counsel argued that the fact that both of the defendants were subsidiaries of Volkswagen AG was irrelevant, stating that Volkswagen AG "had nothing whatever to do with the

design, manufacture or sale of the subject Audi 100 LS." *See* Aplt. App. at 696. Counsel also argued that, although there was an agency relationship between Audi and Volkswagen of America, the submissions in question did not arise from that relationship and the documents were therefore not admissible against either Audi or Volkswagen of America.

The district court excluded the evidence, finding that Volkswagen of America's knowledge had not been acquired by virtue of its agency relationship with Audi and, thus, the documents could not be attributed to Audi. Aple. Supp. App. at 435. The court also held that such knowledge was not admissible against Volkswagen of America because the distributor's knowledge of the state of the art could not be attributed to the manufacturer in a case involving an alleged design defect. *Id.* at 435-36. The jury later returned a verdict for the defendants.

Plaintiffs appealed the judgment. *See Robinson v. Audi NSU Auto Union*, 739 F.2d 1481 (10th Cir. 1984). This court upheld the judgment in favor of Audi NSU but reversed the judgment in favor of Volkswagen of America. As to Audi, we noted that the NHTSA submissions that the trial court excluded were made on behalf of Volkswagen AG rather than Audi and that there was no agency relationship between Audi and Volkswagen of America concerning such submissions at the time the submissions were made (although such a relationship was later made). *Id.* at 1487. Thus, we concluded that the knowledge contained in the documents could not be attributed to Audi. As to Volkswagen of America, however, we concluded that the documents were admissions against interest which showed that Volkswagen of America had prior

knowledge of the alleged defect. We further concluded that such knowledge was relevant to whether the product was unreasonably dangerous and found that under Oklahoma law it was inconsequential that Volkswagen of America did not design or manufacture the allegedly defective vehicle. *Id.* at 1487-88. We therefore ordered a new trial on the claims against Volkswagen of America and sent the case back to the district court. Before a new trial could be held, however, the Oklahoma Supreme Court ruled that a verdict in favor of an automobile manufacturer in a strict liability action absolves a retail dealer of liability where the alleged defect is attributable solely to the manufacturing process rather than to any conduct by the distributor. *See Braden v. Hendricks*, 695 P.2d 1343 (Okla. 1985). Relying on *Braden*, the district court then granted summary judgment in favor of Volkswagen of America. Plaintiffs again appealed, and this time we upheld the judgment. *See Robinson v. Volkswagen of America, Inc.*, 803 F.2d 572 (10th Cir. 1986). In doing so we rejected plaintiffs' argument that evidence of prior knowledge by Volkswagen of America took the case outside of the *Braden* rule. We noted that the jury's determination in favor of Audi established that the placement of the gas tank did not render the Audi 100 LS a defective product, "and this issue cannot be relitigated." *Id.* at 575. Moreover, because there was no allegation that conduct in the distribution process led to any defect, we found that judgment in favor of Volkswagen of America was proper under *Braden*. *Id.*

II. Plaintiffs' Action for Relief From the Judgment.

In 1989, the plaintiffs filed the complaint that forms the basis of this action. Jurisdiction was alleged under the court's "inherent and continuing jurisdiction over its judgments." Aplt. App. at 3. The complaint alleged that during the trial the defendants had intentionally or recklessly misrepresented and failed to disclose a close corporate relationship between Volkswagen AG and Audi NSU (including Audi NSU's predecessor Auto Union GmbH).[2] The allegations focused on statements made to the court by Myron Shapiro, Audi NSU's attorney, concerning the admissibility of the Volkswagen AG NHTSA submissions. Plaintiffs pointed out that Mr. Shapiro argued that the Volkswagen AG submissions were irrelevant to the claims against Audi NSU and that he made certain statements in support of that argument, including an assertion that

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[2] We note the apparently undisputed evidence indicating that during the products liability trial the plaintiffs were aware that Audi NSU was a subsidiary of Volkswagen AG, *see* Aple. Supp. App. at 155, and that based on interrogatory answers plaintiffs' counsel believed at that time that Audi NSU, Volkswagen AG, and Volkswagen of America were "one big happy family." *Id.* The parties clearly disagree over whether the plaintiffs could have avoided the effects of the alleged fraud by exercising greater diligence in investigating the corporate relationships. Be that as it may, the district court made no findings in this regard. Moreover, in *Hazel-Atlas* the Supreme Court indicated that the question of whether the aggrieved party exercised due diligence was not necessarily dispositive in the context of fraud on the court. *See Hazel-Atlas*, 322 U.S. at 246 ("Surely it cannot be that the preservation of the integrity of the judicial process must always wait upon the diligence of the litigants.")

Volkswagen AG had nothing to do with the design, manufacture or sale of the subject Audi 100 LS. Aplt. App. at 20 (Complaint ¶ 46-51). Plaintiffs alleged that these statements were either false or misleading in light of the actual relationship between these companies, which plaintiffs maintained was one of "near alter ego." *Id.* at 9. According to plaintiffs, the misrepresentations were part of a scheme to deceive the court and were designed to conceal the relationship between Volkswagen AG and Auto Union or Audi NSU and thereby prevent any admissions of Volkswagen AG from being introduced into evidence against Audi at the previous trial. Aplt. App. at 152. The complaint alleged that as part of this scheme Audi NSU, acting through its attorney Mr. Shapiro, knowingly gave false answers to plaintiffs' interrogatories concerning the corporate history of Audi NSU and its relationship with Volkswagen AG. Aplt. App. at 27-28. The complaint requested, among other things, that the judgment be set aside.

In April of 1990, the district court found that the allegations in the complaint were sufficient to withstand a motion to dismiss under Fed.R.Civ.P. 12(b)(6). From June 1 to June 15, 1992, the district court conducted a bench trial on the allegations in the complaint. Plaintiffs conceded from the outset that employees of Auto Union GmbH, Audi NSU's predecessor, had designed the fuel system used in the Audi 100 LS and that the particular automobile purchased by the plaintiffs was manufactured by employees of Audi NSU rather than Volkswagen AG. Aple. Supp. App. at 114-15. Plaintiffs alleged, however, that during this period Volkswagen AG owned, controlled and dominated Auto Union and its successor Audi

NSU.[3] At the hearing, plaintiffs presented evidence concerning the interrogatory answers by Audi in the underlying suit. Plaintiffs argued that these answers showed that Mr. Shapiro had covered up the relationship between Volkswagen AG and Audi NSU. Plaintiffs also presented evidence tending to show that Volkswagen AG had a previously undisclosed right of control over Auto Union and Audi NSU, including evidence of written agreements – one between Volkswagen AG and Auto Union GmbH and the other between Volkswagen AG and Audi NSU – which gave Volkswagen AG the right to issue directives to the managing boards of these subsidiaries. *See* Aple. Supp. App. at 617, 626. These agreements also provided that the profits or losses of these subsidiaries would be passed on to Volkswagen AG, and the annual reports of Volkswagen AG showed that this was in fact done. Plaintiffs also presented evidence of a meeting that was held in 1966 during which members of the Auto Union technical department disclosed to the Board of Management of VWAG the development of the Audi 100. Testimony was presented indicating that as a result of this meeting the VWAG Board of Management provided Auto Union the funds for the development and manufacture of the Audi 100 series. Additionally, plaintiffs presented evidence showing that Audi and Volkswagen automobiles were

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[3] This "alter ego" theory was set forth in the complaint. Aplt. App. at 9. In arguments to the court, however, the plaintiffs appeared to assert instead that Volkswagen AG and Auto Union had divided up the tasks necessary for the production of the 100 LS such that they should be considered "joint venturers." Aple. Supp. App. at 117.

produced at the same facility in West Germany between 1965 and 1969.

The defendants countered with their own evidence at the hearing, including the testimony of Audi's attorney, Mr. Shapiro. Mr. Shapiro denied that he had intentionally given false answers or had concealed facts in answering plaintiffs' interrogatories. He explained how he had obtained information from his client and how he had formulated the answers given in the interrogatories. He indicated that some information regarding the ownership history of Auto Union had been inadvertently left out of interrogatory answers. Aple. Supp. App. 492. He testified that, contrary to the plaintiffs' theory that he had schemed from the beginning to keep Volkswagen AG's NHTSA submissions out of evidence, he was unaware of the specific NHTSA submissions in question until they were disclosed by the plaintiffs at the trial. He testified (as he had told the judge during the products liability trial) that prior to trial he had checked to see if Audi had made any submissions to the NHTSA concerning fuel system integrity but did not pursue indications that Volkswagen AG made such submissions because he believed any submissions by Volkswagen AG would be irrelevant to the claims against Audi NSU. Aple. Supp. App. at 207. Without going into unnecessary detail, we simply note that Mr. Shapiro's testimony provided a basis upon which the district court could conclude that the interrogatory answers were made by Mr. Shapiro without any intent to deceive or defraud.

As to Mr. Shapiro's arguments to the court concerning the NHTSA submissions, Mr. Shapiro testified at the hearing that, to the best of his knowledge, he did not

misrepresent any facts to the judge. His testimony suggested that his representations were based on his belief that Volkswagen AG and Audi NSU, although they were parent and subsidiary, were legally separate entities. Mr. Shapiro testified that he had been unaware of the aforementioned contracts between Volkswagen AG and Audi NSU (and Auto Union) at the time he made his representations to the court. He conceded that prior to trial he had made no investigation of whether such contracts existed. Aplt. App. at 366, 369-70. He indicated that when he made his representations to the court, he did so based upon a belief that his prior representation of these companies had given him good knowledge of the relationship between them. Aplt. App. at 350.

By way of deposition, L. A. M. Dekkers, who had been the managing director of Auto Union GmbH from 1964 to 1969, testified that Volkswagen AG knew nothing about the initial stages of the Audi 100 LS, indicating that the car had been independently developed by Auto Union's technical department. Aplt. App. at 163. Dekkers stated that Auto Union operated independently and that Volkswagen AG played no role in the design of the Audi 100 LS. *Id.* at 259. Professor Buxbaum, an expert on German law called by the defendants, characterized the profit and loss transfer agreements referred to above as standard agreements under German law that allow parent and subsidiary corporations to obtain consolidated tax and reporting treatment. Aple. Supp. App. at 217. He indicated that some of the terms in the agreement, including those referring to the "integration" of Auto Union into Volkswagen AG, were required by German statute in order to obtain consolidated tax treatment. He further

indicated that under the agreement Volkswagen AG had the right to issue directives to Auto Union, which gave the former a right of control; but that, in the absence of a specific directive, the subsidiary was required to operate independently. Heinrich Ulmer, head of the legal department at Audi NSU, testified that Volkswagen AG issued no directives to Audi concerning the design or manufacture of the Audi 100 LS. Aple. Supp. App. at 296.

District Court Ruling. After hearing the evidence and the arguments relating to the alleged fraud and after reviewing the parties' proposed findings of fact and conclusions of law, the district court issued a memorandum and order finding in favor of the defendants. In that memorandum the court summarized the plaintiffs' allegations of fraud, including plaintiffs' assertion that Audi's counsel led a concerted effort to conceal the corporate relationship between Volkswagen AG and Audi NSU or, in the alternative, that he was "less than honest about his knowledge of that relationship." "In sum," the court noted, "Plaintiffs argue that the evidence adduced establishes a scheme to suppress information vital to its case as it pertains to the corporate relationships and, therefore, imputed knowledge of Audi NSU vis a vis the allegedly defective design of the gas tank and fuel system of the Audi 100 LS." After stating that he would have admitted the NHTSA submissions at trial had he known all of the facts now before him, the judge nevertheless held that the evidence failed to support the allegations of fraud:

> The Court has reviewed the record and, most particularly, the evidence presented by Plaintiffs/Movants herein. Indeed, the Court was

> compelled to study in some depth the effective and exhaustive case prepared by Plaintiffs' counsel to ascertain its proper interface with the relevant law. As a preliminary matter, the Court must concede that had it been appraised of the material contained in Plaintiffs' Proposed Findings of Fact and Conclusions of Law (FF/CL) filed July 27, 1992 at pp. 38-42 (nos. 53-55) the submissions exhibits at issue would most assuredly have been admitted into evidence. Indeed, it seems fair to say that if the relevant corporate relationships set forth in Plaintiffs' FF/CL, cited above had been on record, VWAG would have been joined as a defendant. And the Court so finds. However, nowhere in this meticulously prepared and effectively argued claim does there appear clear and convincing evidence that Defendants' counsel was involved in a "deliberately planned and carefully executed scheme" to defraud this Court through misrepresentation and nondisclosure. In the absence of such evidence, the Court is bound by the relevant case law to deny Plaintiffs' Motion. This case is, accordingly, dismissed.

Aplt. App. at 173.

III. Issue on Appeal.

The sole point of error alleged by the plaintiffs is that the trial court applied an incorrect legal standard for fraud on the court. Aplt. Br. at ii. Focusing on the court's finding that there was no evidence of a "deliberately planned and carefully executed scheme" and the comment that "in the absence of such evidence, the Court is bound by the relevant case law to deny Plaintiffs'

Motion," plaintiffs contend that the district court applied an unduly narrow definition of fraud on the court. Plaintiffs point out that the "deliberately planned" language used by the district court was taken from *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), a leading Supreme Court case; and they argue that the trial court mistakenly substituted the factual basis of the fraud found in *Hazel-Atlas* for the broader standard of fraud generally: "We submit that the trial court's conversion of that clearly *sufficient* factual predicate into the *necessary* legal standard for all cases is erroneous as a matter of law." Aplt. Br. at 30 (emphasis in original). Although plaintiffs are not entirely clear on this point, we gather it is their contention that the district court erred by failing to recognize that statements made with reckless disregard for the truth, in addition to "deliberate" misrepresentations, can form the basis of fraud on the court.

Plaintiffs emphasize that their challenge is solely to the legal standard applied by the court; for purposes of appeal, they accept the district court's factual finding that there was no deliberate scheme to defraud the court on the part of defendants' counsel. Aplt. Rep. Br. at 5. Moreover, inasmuch as the only issue is whether the trial court properly applied the doctrine of "fraud on the court," no issue is raised as to whether the facts are sufficient to permit relief on some other grounds, such as mistake or newly discovered evidence. *Cf.* Fed.R.Civ.P. 60(b).

IV. Discussion.

In order to address plaintiffs' claim, we first review the nature of "fraud on the court" as it has been recognized by the courts. We then proceed to address whether the district court's ruling is consistent with that standard.

Any request to set aside a judgment must be viewed in light of a fundamental principle of the finality of duly entered judgments: namely, where a reasonable opportunity has been afforded to the parties to litigate a claim before a court having jurisdiction, and the court has finally decided the controversy, the interests of the public and of the parties require that the validity of the claim and any issue actually litigated in the action shall not be litigated again by them.[4] *Restatement of Judgments (First)* § 1 (1942). *See United States v. Throckmorton*, 98 U.S. 61, 65-66, 25 L.Ed. 93 (1944). One long-recognized exception to the general rule of finality is where a judgment was based on a claim that the party obtaining the judgment knew it to be fraudulent. *See Restatement of Judgments (Second)* § 70 (1982). Historically, this exception was said to apply, however, only when the fraud was so successful

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[4] Historically, this principle was said to apply even though the party against whom the judgment was entered is later in a position to produce better evidence so that he would be successful in a second action, and even though the judgment may have been based on an erroneous view of the law or the facts. *Restatement of Judgments (First)* § 1, Comment b (1942). The procedures available to the parties in the district court and in an appellate court in the original action were deemed sufficient to protect against erroneous judgments, and if such procedures did not result in reversal of the judgment, a party was generally not entitled to another opportunity to present his claim. *Id.*

that the other party was not even aware that he had a possibility of a claim or defense.[5] *Restatement of Judgments (First)* § 118, Comment a. By contrast, relief was not available – even in the case of an erroneous and inequitable judgment – on the sole ground that the judgment was obtained by perjured testimony or that the complainant failed to maintain his action because of a nonfraudulent misrepresentation as to the facts by the other party. *Id.* at § 126.

In *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), the Supreme Court recognized what is now referred to as the "fraud on the court" doctrine. In that case, attorneys and agents of respondent Hartford, in order help Hartford obtain a patent, had prepared and submitted a spurious trade journal article to the U. S. Patent Office. Hartford's application for the patent was granted, and Hartford later brought suit against petitioner Hazel-Atlas alleging infringement of the patent. A lower court found no infringement. The case was then appealed to the circuit court. In the course of the appeal, one of the attorneys who had played a part in getting the spurious article published referred the circuit court to the article. Relying in part upon the article, the circuit court concluded that the patent was valid and reversed the judgment. Hazel-Atlas then brought an action in the circuit court setting forth the circumstances surrounding the use of the spurious article and requesting relief from the judgment. The circuit court refused to grant relief, however, citing among other things a lack of diligence on Hartford's part and a belief that the court had no power

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[5] *Cf. United States v. Throckmorton, supra.*

to set aside a judgment after the end of the term of court at which the judgment was entered.

On appeal from that ruling the Supreme Court held that federal courts have inherent equitable power to grant relief in cases of after-discovered fraud regardless of the "end of the term rule," and concluded that "every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments." The Court noted that this was not simply a case of a judgment obtained with the aid of a witness who is believed possibly to have been guilty of perjury, but was "a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals." *Id.* at 245. The Court rejected suggestions that a lack of diligence by the aggrieved party could justify denial of relief, finding that tampering with the administration of justice in the manner shown here involved more than an injury to a single litigant and that the court's power to preserve the integrity of the judicial process did not depend on the diligence of the litigants. *Id.* at 246.

In *Bulloch v. United States*, 763 F.2d 1115 (10th Cir. 1985) (en banc), this court summarized the nature of "fraud on the court" in light of *Hazel-Atlas* and other cases:

> Fraud on the court . . . is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury. It has been held that allegations of nondisclosure in pretrial discovery will not support an action for fraud on the court . . . It is thus fraud where the court or a

> member is corrupted or influenced or influence is attempted or where the judge has not performed his judicial function – thus where the impartial functions of the court have been directly corrupted.

Id. at 1118. *See* Aplt. App. at 170 (Passage cited in District Court's Memorandum and Order of 9/17/92 at 7).

As we noted previously, plaintiffs' assertion of error appears to be based on the view that the district court misunderstood the element of scienter required for fraud on the court. Few courts have addressed what, if any, specific mental state must be shown in order to characterize a false representation to the court as a "fraud upon the court" sufficient to set aside a judgment. As plaintiffs point out, the Sixth Circuit recently held that "a scheme based on a subjective intent to commit fraud" is not required because "reckless disregard for the truth is sufficient." *Demjanjuk v. Petrovsky*, 10 F.3d 338, 353 (6th Cir. 1993), *cert. denied*, 115 S.Ct. 295 (1994). Other courts seem to have taken a more restrictive view, stating that a fraud on the court occurs "where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense." *See Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989). *See also Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978)(quoting *England v. Doyle*, 281 F.2d 304, 310 (9th Cir. 1960) ("[I]t is necessary to show an unconscionable plan or scheme which is

designed to improperly influence the court in its decision.") *Cf. In Re Laing*, 945 F.2d 354, 357-58 (10th Cir. 1991).

We think it clear that "fraud on the court," whatever else it embodies, requires a showing that one has acted with an intent to deceive or defraud the court. A proper balance between the interests underlying finality on the one hand and allowing relief due to inequitable conduct on the other makes it essential that there be a showing of conscious wrongdoing – what can properly be characterized as a deliberate scheme to defraud – before relief from a final judgment is appropriate under the *Hazel-Atlas* standard. Thus, when there is no intent to deceive, the fact that misrepresentations were made to a court is not of itself a sufficient basis for setting aside a judgment under the guise of "fraud on the court." *Cf. Restatement of Judgments (First)* § 126 (Equitable relief will not be granted on the sole ground that the complainant failed to maintain his action because of a nonfraudulent misrepresentation as to the facts by the other party.)

Having found that a "fraud on the court" requires an intent to deceive or defraud the court, we now turn to plaintiffs' claim that the district court applied an improper standard. Our review of the entire record convinces us that the district court applied a standard consistent with the foregoing discussion of fraud on the court and that its refusal to grant relief was not an abuse of discretion. The district court, in over five pages of discussion devoted to the issue, discussed and set forth the holdings of the Supreme Court in *Hazel-Atlas* and of this court in *Bulloch*. The court further noted, as plaintiffs had

argued, that attorney misconduct directed at the court can constitute a "fraud on the court":

> While it is incumbent upon an attorney to "represent his client with singular loyalty, that loyalty obviously does not demand that he act dishonestly or fraudulently; on the contrary his loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court.

Memorandum and Order at 8(citing 7 Moore, Federal Practice ¶ 60.33 at 513 (1971 ed.) The court quite clearly – and properly – recognized that a violation of the duty of honesty is essential to a claim of fraud on the court.

Against this backdrop the district court found no evidence that defendants' counsel was involved in a " 'deliberately planned and carefully executed scheme' to defraud this Court through misrepresentation and nondisclosure." We see nothing improper in the district court's dismissal of the complaint upon making this finding. As our previous discussion indicates, fraud on the court requires an intent to deceive or defraud the court. The district court found as a factual matter that no such intent had been shown.[6] Although plaintiffs now maintain that the trial court's opinion shows that it misunderstood that scope of fraud on the court, in fact the

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[6] It is clear that the district court's ruling was based upon a lack of any intent to defraud the court. We would also point out, however, that notwithstanding the court's "finding" that had it known the corporate relationships it would have admitted the NHTSA submissions and Volkswagen AG would have been made a party, the district court made no finding that the representations made by Audi's attorney were false. Although plaintiffs argue that the relationship between the companies shows that the statement that Volkswagen AG "had nothing whatever

court's dispositive finding was directly responsive to the claim asserted by plaintiffs. *See* Aplt. App. at 152 (Pretrial Order, Plaintiffs' Contentions, App. E, ¶ 3).

The district court's determination on the question of intent is a factual finding. As a reviewing court, we may not set aside that finding unless it is "clearly erroneous." Fed.R.Civ.P. 52(a). Where, as here, a factual determination rests upon the credibility of a witness, Rule 52(a) demands even greater deference to the findings of the trial judge. *Anderson v. City of Bessemer*, 470 U.S. 564, 574, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). Although plaintiffs deny that they are challenging the district court's factual determination, much of their briefs is devoted to arguing that the evidence shows that Audi's attorney acted with an intent to deceive. We have reviewed the record and are satisfied that the district court's finding is not clearly erroneous. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson, supra*. The district court's finding in this case, although not the only possible view,

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to do with" the design or manufacture of the Audi 100 LS is "just not true," such a representation can be reasonably viewed as a true statement of the legal relationship between these companies. Mr. Shapiro's comments could clearly be considered a good faith legal argument. The question of whether an allegedly dominant corporation may be held liable for a subservient entity's tort depends on many factors. *Frazier v. Bryan Memorial Hosp. Authority*, 775 P.2d 281, 288 (Okla. 1989). There is conflicting evidence in this record concerning the factors relevant to whether the separate corporate identities of Volkswagen AG and Audi (or its predecessor) could have been disregarded. *Cf id.*

has substantial support in the record and is a permissible view in light of all the evidence.

Conclusion.

The judgment of the district court is AFFIRMED.

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

HARRY ROBINSON AND KAY ROBINSON; EVA MAY McCARTHY; and GEORGE SAMUEL ROBINSON,	)	No. 93-5168
Plaintiffs-Appellants,	)	
v.	)	
VOLKSWAGENWERK AG and HERZFELD & RUBIN, P.C.,	)	
Defendants-Appellees.	)	

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 88-C-367-E)
(Filed May 30, 1995)

Winton D. Woods, Tucson, Arizona (Ronald D. Mercaldo and Lucile D. Sherman of the Law Offices of Ronald D. Mercaldo, Ltd., Tucson, Az., Thomas Elke, Palo Alto, California, and Maynard I. Ungerman, Ungerman & Iola, Tulsa, Oklahoma, with him on the briefs), for plaintiffs-appellants.

Richard M. Eldridge, Rhodes, Hieronymus, Jones, Tucker & Gable, Tulsa, Oklahoma (John H. Tucker, of the same firm, and Herbert Rubin and Daniel V. Gsovski, Herzfeld & Rubin, P.C., New York, New York, with him on the brief), for defendants-appellees.

Before EBEL and KELLY, Circuit Judges, and BROWN, District Judge.*

BROWN, District Judge.

Plaintiffs brought claims of common law fraud against Herzfeld & Rubin, P.C. ("H&R") and Volkswagenwerk Aktiengesellschaft ("Volkswagen AG"), as well as claims for negligence, products liability and breach of warranty against Volkswagen AG. The district court held that all of the claims were time-barred and, in addition, found that the claims for negligence, products liability and breach of warranty were barred by the doctrine of claim preclusion. Plaintiffs now argue that the district court's rulings were erroneous. We exercise jurisdiction under 28 U.S.C. § 1291 and, for the reasons set forth herein, we affirm.

I. Background.

This case is closely related to the separately filed appeal of *Robinson v. Audi AG*, No. 92-5238 (10th Cir. April ___, 1995). Many of the relevant facts are set forth in that opinion and will not be repeated here. We briefly

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* The Honorable Wesley E. Brown, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

summarize the facts in order to explain the issues presented in this appeal.

Plaintiffs were severely burned in an auto accident in 1977. The car in which they were traveling, a 1976 Audi 100 LS, burst into flames after being rear-ended by another car. Plaintiffs filed a products liability suit alleging that their injuries were caused by defective design and placement of the Audi 100 LS's gas tank and fuel system. Volkswagen of America, Inc., a national distributor of Audi automobiles, was named as a defendant in the case. Volkswagen AG was initially named by plaintiffs as the manufacturer of the car. Plaintiffs subsequently substituted Audi NSU Auto Union AG ("Audi NSU"),[1] a subsidiary of Volkswagen AG, as the manufacturer. The substitution was made after plaintiffs' counsel was informed by an attorney for one of the defendants that Audi NSU was in fact the manufacturer. The case was tried to a jury in the U. S. District Court for the Northern District of Oklahoma. In the course of trial, a dispute arose over whether certain documents submitted to the National Highway Traffic Safety Administration (NHTSA) on behalf of Volkswagen AG could be introduced in evidence. Counsel for Audi NSU argued that the submissions should be excluded, contending that they were irrelevant to the claims against Audi NSU. The district court held that the documents were not admissible. The jury subsequently returned a verdict in favor of

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[1] The briefs indicate that Audi NSU Auto Union Aktiengesellschaft is now known as Audi Aktiengesellschaft. In this opinion we will simply refer to the company as "Audi NSU."

Audi NSU and Volkswagen of America. After a series of rulings, the judgment eventually was affirmed on appeal. *See Robinson v. Volkswagen of America*, 803 F.2d 572 (10th Cir. 1986). *See also Robinson v. Audi NSU Auto Union*, 739 F.2d 1481 (10th Cir. 1984).

a. *Complaint Alleging Common Law Fraud.* On October 5, 1987, plaintiffs filed a complaint in the U. S. District Court for the Northern District of Arizona naming as defendants Volkswagen AG, the parent company of Audi NSU, and H&R, the law firm that represented Audi NSU in the previous products liability trial and which also represented Volkswagen AG. Jurisdiction was asserted based on diversity of citizenship. The case was subsequently transferred to the Northern District of Oklahoma and was assigned to the same judge who had presided over the products liability trial. The complaint sought damages for common law fraud, products liability, negligence and breach of warranty. The latter three claims were based on the allegedly faulty design of the Audi 100 LS in which plaintiffs had been injured. The fraud claims were based on alleged misrepresentations by Audi NSU's attorney, Myron Shapiro, in the course of plaintiffs' product liability action against Audi NSU. These misrepresentations, according to the complaint, were made knowingly by Mr. Shapiro for the purpose of keeping the Volkswagen AG NHTSA documents from being used by the plaintiffs at trial. *See* Aplt. Supp. App. at 32-56. Plaintiffs alleged that, contrary to representations made by Mr. Shapiro, Volkswagen AG was the "near alter ego" of Audi NSU and, as such, the documents attributable to Volkswagen AG should have been admitted against Audi NSU. Plaintiffs further alleged that this fraud caused the

court to exclude the NHTSA documents from the trial and led to the adverse jury verdict. The defendant Volkswagen AG was alleged to have acted "by and through H&R, their attorneys and duly authorized agents." Aplt. Supp. App. at 32; 54.

b. *Complaint alleging fraud on the court.* In 1989, plaintiffs filed a separate complaint in the U. S. District Court for the Northern District of Oklahoma alleging that the judgment in their products liability trial had been obtained by means of a "fraud upon the court." This complaint requested equitable relief from the judgment based on the court's "inherent and continuing jurisdiction over its judgments." Like the previously filed complaint seeking damages for fraud, this complaint alleged that Audi NSU's attorney had misrepresented to the court the relationship between Audi NSU and Volkswagen AG in order to keep the NHTSA documents from being used against Audi NSU at the trial.

The district court conducted a bench trial on the allegations of fraud on the court. After hearing all of the evidence, the court concluded that there was no clear and convincing evidence that Audi NSU's attorney had engaged in a scheme to defraud the court through misrepresentation or nondisclosure. Consequently, the district court denied the request for relief from the judgment. Plaintiffs have appealed that ruling and, in the related appeal previously mentioned, *Robinson v. Audi AG*, No. 92-5238 (10th Cir., April ___, 1995), we have now affirmed the district court's refusal to grant relief from the judgment in favor of Audi NSU and Volkswagen of America.

II. District Court Ruling on the Common Law Fraud Complaint.

The instant appeal concerns the district court's ruling on the 1987 complaint against Volkswagen AG and H&R. As to the claims for common law fraud, the district court first held as a matter of law that plaintiffs' only recourse for such claims was under the provisions of Fed.R.Civ.P. 60(b) governing relief from judgments. The court then concluded that plaintiffs' fraud claims were time-barred under Rule 60(b), noting that motions for relief predicated on "fraud, misrepresentation or other misconduct of an adverse party" must be brought "not more than one year after the judgment, order, or proceeding was entered or taken." *Id.* Plaintiffs' claims, the court observed, were raised more than one year after the judgment was taken. As to the claims for products liability, negligence and breach of warranty, the court found that these claims were barred by the doctrine of claim preclusion.[2]

III. Discussion.

a. *Fraud claims.* In analyzing whether the district court properly granted judgment in favor of the defendants on plaintiffs' claims for common law fraud, we first examine the effect of the prior judgment against plaintiffs in their products liability suit with Audi NSU. Plaintiffs emphasize that they are not attempting in this action to

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[2] The district court also held that these claims were barred by the Oklahoma statute of limitations. We do not address the statute of limitations issue because we agree that the claims are barred by claim preclusion.

have the previous judgment set aside. Aplt. Br. at 17. Rather, they are seeking to recover damages said to be caused by the defendants' fraud in the course of obtaining that judgment. It is plaintiffs' position that in Oklahoma "a civil action lies for fraud committed in connection with a lawsuit without setting aside any judgment entered in that lawsuit." *Id.* at 7. Under the circumstances of this case, however, we find that the previous judgment operates as a bar to the damages claimed by the plaintiffs.

Under the doctrine of collateral estoppel, or "issue preclusion," once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. *Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980).[3] *See*

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[3] Although there is some confusion as to whether application of collateral estoppel is governed by federal or state law in successive diversity actions, *see Frandsen v. Westinghouse*, 46 F.3d 975, 977 (10th Cir. 1995), we conclude that the result in this case is the same regardless of whether Oklahoma law or federal law is applied.

We note that some Oklahoma cases indicate there must be "identity of parties," or mutuality, in order for collateral estoppel to apply. The Oklahoma Supreme Court has recognized, however, that in some circumstances collateral estoppel may be asserted defensively by one who was not a party to the first action. *ANCO Mfg. v. Swank*, 524 P.2d 7, 13 (Okla. 1974). In light of the circumstances of this case, including the alleged relationship between the defendants in this and the previous trial, we think that Oklahoma would not prohibit the defensive assertion of collateral estoppel on the sole grounds that the defendants here were not parties to the previous action. *See Restatement (Second) Judgments* §§ 29 and 51 (1982). Mutuality is not required

Wilson v. Kane, 852 P.2d 717, 722 n. 23 (Okla. 1993). Issue preclusion will not apply, however, if the party against whom it is asserted did not have a full and fair opportunity to litigate the issue in the earlier case. *See Allen, supra; Veiser v. Armstrong*, 688 P.2d 796, 800 (Okla. 1984).

The jury's verdict in favor of Audi NSU on the plaintiffs' product liability claims necessarily means that the jury found at least one of the following facts: (1) that no defect existed in the Audi 100 LS fuel tank; (2) that the alleged defect did not make the product unreasonably dangerous; or (3) that the alleged defect in the Audi 100 LS fuel tank did not cause the plaintiffs' injuries. *See* Aplt. Br. at 17. The jury's determination of any of the foregoing facts was both "actually decided in the suit" and was "necessary to support the judgment." *See Restatement (Second) Judgments* § 27. Contrary to plaintiffs' argument, we conclude that the existence of any one of these facts is incompatible with the damages for fraud claimed by the plaintiffs in this action. The damages claimed include plaintiffs' loss of the lawsuit against Audi NSU, loss of the opportunity to try the case with the most compelling evidence, loss of the chance of prevailing in the underlying suit with the most compelling evidence, loss of the settlement value of the case, loss of their right to a full and fair opportunity to present their case to a jury of their peers and to recover the full damage to which they would have been entitled upon the jury's verdict, as well as the value of the chance to win the lawsuit with the admission of the exhibits that were kept out as a result of the

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under federal law. *Blonder-Tongue Labs. v. Univ. Foundation*, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971).

defendants' alleged fraud. Aplt. Supp. App. at 55-56. Each of these claims of damages rests upon an unstated but common foundation: they would require plaintiffs to show that, but for the alleged fraud leading to the exclusion of the NHTSA documents, the jury would have found in the plaintiffs' favor. But to show this, plaintiffs would in turn have to establish that the Audi 100 LS gas tank was in fact defective; that it was unreasonably dangerous; and that it was the cause of the plaintiffs' injuries in the accident. Thus, plaintiffs claims of damages for fraud are based upon assertions of fact that are inconsistent with the facts supporting the prior judgment.[4]

Given this inconsistency, we think the trial court was correct insofar as it concluded that plaintiffs could not pursue their claims for damages without first obtaining relief from the judgment. However, the district court was incorrect in stating that any request for relief from the

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[4] Plaintiffs argue that some of their damages for fraud exist independently of the outcome of the underlying suit. We recognize that the claimed damages include the value of "lost chances" in the underlying suit. In this context, however, the value of such lost chances is purely speculative absent a showing that the result of the suit would have been different. That showing would require the plaintiffs to establish facts contrary to those underlying the first judgment. Moreover, even if, as plaintiffs argue, the damages could be considered independent of the outcome of the first suit, we see no indication that Oklahoma has recognized a doctrine of "lost chance" of prevailing in a lawsuit that would permit plaintiffs to recover such damages. *See* Aplt. Supp. App. at 132. *Cf. Terrell v. Gotcher*, 174 P.2d 229, 230 (Okla. 1946) (Plaintiff was attacking the validity of a previous judgment by bringing an action for damages he claimed he would have recovered in the first action had it not been for fraud practiced upon him by the defendants' attorneys.)

judgment was barred by the one-year time limit placed on motions under Fed.R.Civ.P. 60(b). Rule 60(b) places a one-year time limit on certain motions seeking relief from a judgment, including motions premised upon fraud or misconduct of an adverse party. The rule, however, "does not limit the power of the court to entertain an independent action to relieve a party from a judgment. . . . " *Id.* Thus, if the right to make a motion is lost because of the time limits of Rule 60(b), there is another procedural remedy available: "by a new or independent action to set aside a judgment upon those principles which have heretofore been applied in such an action." *Id.*, Advisory Committee Notes to 1946 Amendment. *See W. Virginia Oil & Gas Co. v. Breece Lumber Co.*, 213 F.2d 702, 706 (5th Cir. 1954). On the claims now before us, the plaintiffs clearly proceeded by way of filing a separate action rather than by motion in the action giving rise to the judgment. "Where the independent action is resorted to, the limitations of time are those of laches or statutes of limitations." Fed.R.Civ.P. 60, Advisory Committee Notes to 1946 Amendment. Thus, the one-year limit in Rule 60(b) does not apply to the plaintiffs' complaint.

Nevertheless, we conclude that on the record before us the district court's dismissal of plaintiffs' common law fraud claims was appropriate. *See Jones v. Bank of Santa Fe*, 40 F.3d 1084, 1087 (10th Cir. 1994) (Appellate court may affirm the district court judgment on any basis supported by the record.) As an initial matter, plaintiffs have steadfastly maintained that they are not seeking relief from the underlying judgment in favor of Audi NSU. Aplt. Br. at 12 ("We [emphasize] once again that this common law fraud action is not for relief from the judgment but for

damages caused by the judgment. . . . "). If that is the case, then in our view, the common law fraud claims are barred because they are inconsistent with facts underlying the prior judgment. Notwithstanding their previous comment, however, plaintiffs have also argued that the alleged fraud should equitably estop the defendants from claiming issue preclusion, Aplt. Br. at 14, and that the alleged fraud deprived the plaintiffs of a full and fair opportunity to litigate the issues in the underlying trial. Aplt. Rep. Br. at 14. Although not denominated as such, these arguments amount to assertions that the plaintiffs should be relieved from the effects of the judgment.[5] We thus construe plaintiffs' complaint to be an "independent

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[5] As previously mentioned, the courts have recognized that collateral estoppel should not be applied where the person against whom it is asserted did not have a full and fair opportunity to litigate the facts supporting the judgment. Such a determination "will necessarily rest on the trial court's sense of justice and equity." *Blonder-Tongue Labs. v. Univ. Foundation*, 402 U.S. 313, 334, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971). Although this inquiry normally focuses on whether there were procedural limitations or a lack of incentive to fully litigate an issue in the prior proceeding, concealment of material information by a party may justify a refusal to give preclusive effect to a judgment. *See Restatement (Second) Judgments*, § 28, Comment j.

This exception to the doctrine of collateral estoppel provides a means of avoiding the effects of a prior judgment in the course of a subsequent action. It "may be perceived as a proceeding to obtain what is traditionally known as equitable relief in a sublitigation within the framework of the action in which the judgment is relied upon." *See Restatement (Second) Judgments* § 80, Comment a. As such, it mirrors the independent action in equity recognized by Fed.R.Civ.P. 60(b) and, for purposes of this case, we see no difference between the two.

action" for relief from the judgment recognized by Rule 60(b).

An independent action permits the granting of the various kinds of relief from judgments which were permitted in the federal courts prior to the adoption of the Federal Rules. *See* Fed.R.Civ.P. 60, Notes of Advisory Committee on 1946 Amendment. Such a proceeding is regarded as equitable in nature and is directed to the discretion of the trial court. *Zimmerman v. First Fed. Savings & Loan Ass'n.*, 848 F.2d 1047, 1053 (10th Cir. 1988). Clearly, the equitable principles recognized by the courts authorize relief from judgments in certain cases of fraud.[6]

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[6] The type of fraud necessary to obtain relief from a fraudulently obtained judgment, filed either as a post-judgment motion in the original action to set aside the judgment or as an independent action for damages incurred because of the fraud that led to the judgment, is considerably narrower than common law fraud. The *Restatement (Second) of Judgments* § 70(1) provides for relief from a judgment if the judgment: "(a) [r]esulted from corruption of or duress upon the court or the attorney for the party against whom the judgment was rendered, or duress upon the party, or (b) [w]as based upon a claim that the party obtaining the judgment knew to be fraudulent." In the case before us, we have no allegations of "corruption of or duress upon the court or the attorney for the party against whom the judgment was rendered." Thus, relief would have to be predicated on an allegation that the earlier judgment was based on a claim that the party obtaining the judgment "*knew to be fraudulent.*" This is the same claim, predicated on the same facts, that was asserted in *Robinson v. Audi AG*, No. 92-5238 (10th Cir. ___). The rulings in that case are a bar to plaintiffs trying to raise those claims here. Furthermore, without any basis to reopen or challenge the propriety of the prior judgment against them, the plaintiffs cannot establish damages and thus their common law claim for fraud must also fail.

We think it cannot be fairly disputed, however, that in addressing plaintiffs' claim of "fraud on the court" in *Robinson v. Audi AG*, No. 92-5238 (10th Cir.), the trial court expressly rejected as unsupported by the evidence the same factual basis now asserted by the plaintiffs as justification for avoiding the prior judgment.

In their "fraud on the court" complaint plaintiffs set forth allegations of fraud identical in all material respects to those asserted in the complaint against Volkswagen AG and H&R. The trial court conducted a bench trial on those allegations and, after hearing all of the evidence, concluded that there was no clear and convincing evidence that Audi's attorney, Myron Shapiro, engaged in a scheme to defraud the court through misrepresentation or nondisclosure. Plaintiffs have identified nothing that would indicate they did not have a full and fair opportunity to present their claims of fraud in that forum. Although plaintiffs suggest that the "fraud on the court" inquiry was somehow more limited than the fraud now at issue, that suggestion is belied by the record. The trial court's finding is simply incompatible with the allegations of fraud in the complaint against Volkswagen AG and H&R and precludes relitigation of the fraud issue in this action. *Bulloch v. Pearson*, 768 F.2d 1191, 1193 (10th Cir. 1985). As such, plaintiffs have established no basis for obtaining relief from the judgment in favor of Audi NSU and the district court did not err in dismissing the claims for common law fraud.

b. *Claims of Negligence, Products Liability and Breach of Warranty.* We also conclude that the district court properly dismissed the remaining claims against Volkswagen

AG. Under the doctrine of res judicata, or "claim preclusion," a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *See Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 441, 66 L.Ed.2d 308 (1980). The product liability claim against Volkswagen AG was previously asserted against Audi NSU, the difference being that plaintiffs now allege that Volkswagen AG had a controlling relationship with Audi NSU and is therefore responsible for the torts of its subsidiary. If true, however, this "near alter ego" relationship would be sufficient to establish "privity" between the two corporations such that Volkswagen AG is entitled to assert the previous judgment as a bar to the claim now asserted. *See e.g. Pan American Match, Inc. v. Sears, Roebuck and Co.*, 454 F.2d 871, 874 (1st Cir. 1972). *See also Restatement of Judgments (Second)* § 51. The judgment also bars the claims of negligence and breach of warranty in light of the fact that those claims are based on the same transaction that gave rise to the products liability action. *Petromanagement Corp. v. Acme-Thomas Joint Venture*, 835 F.2d 1329, 1335 (10th Cir. 1988). In concluding that the dismissal of these claims was proper, we do not ignore the fact that fraud may provide a basis for relief from res judicata, nor do we overlook plaintiffs' allegations that the relationship between Volkswagen AG and Audi NSU was fraudulently covered up. Plaintiffs were given an opportunity to prove these allegations, however, and the district court concluded that the evidence did not support them.

IV. Conclusion.

The judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HARRY ROBINSON and KAY ROBINSON, husband and wife, et al.,	)	No. 88-C-367-E
Plaintiffs,	)	
vs.	)	
AUDI AKTIENGESELLSCHAFT, f/k/a AUDI NSU AUTO UNION AKTIENGESELLSCHAFT, a foreign corporation, et al.,	)	
Defendants.	)	

ORDER AND JUDGMENT

(Filed Sept. 17, 1992)

This matter is before the Court as an action to Set Aside the Judgment entered in the underlying case (case no. 80-C-85-E) on the grounds of fraud upon the Court, Rule 60(b) Fed.R.Civ.P. The procedural history of this case has been well-documented in the record and a lengthy exposition of it here is unnecessary. It will suffice to say that the initial lawsuit, brought in state court, arose from grievous injuries suffered in a tragic automobile accident, a rear-end collision, which occurred on an Oklahoma highway in 1977. The collision precipitated a fire in Plaintiffs' 1976 Audi 100 LS, severely burning the occupants. Plaintiffs alleged in the state court suit that the gas tank of the Audi was defectively designed. It was Defendants' position that the speed of the oncoming Ford Torino (estimated to be approximately 90 m.p.h.) which collided with Plaintiffs' Audi (traveling at some 55 m.p.h.) and not

the design of the Audi's fuel system caused the punctured gas tank, fire and ensuing injuries. The case was removed to federal court where a jury returned a verdict for Defendants in 1981. The case was appealed twice to the Circuit. In *Robinson v. Audi NSU Auto Union*, 739 F.2d 1481 (1984) the Court of Appeals held, *inter alia*, that it was reversible error for the trial court to exclude evidence that Volkswagen of America, Inc., as distributor, knew of the risk inherent in the gas tank system of the Audi 100. The Court declared the evidence, a 1968 NHTSA (National Highway Traffic Safety Administration) submission was an admission under Federal Rule of Evidence 801(d)(A) on the issue of strict liability. *Id.* at 488-489. The Circuit also ruled that the statements were attributable to Volkswagen of America but not to Audi because the statements were made on behalf of Volkswagenwerk Aktiengesellschaft, the German manufacturer, and because the statements pre-dated the agency relationship between Volkswagen of America and Audi NSU. *Id.* at 1487. On remand, this Court granted summary judgment in favor of Volkswagen of America pursuant to a, then, recent decision of the Oklahoma Supreme Court in *Braden v. Hendricks*, 695 P.2d 1343 (Okla. 1985). *Braden* held that a distributor is automatically exonerated in a strict liability action alleging a manufacturing defect if the automobile manufacturer is absolved. Upon Plaintiffs' second appeal to the Tenth Circuit, *Robinson v. Volkswagen of America, Inc.*, 803 F.2d 572 (10th Cir. 1986) that judgment was affirmed.

The Plaintiffs have charged that a shocking ubiquity of fraud, on the part of Defendants, pervaded the case, thus denying Plaintiffs their day in Court. The Court

agreed to hear the matter as a Rule 60(b) issue. Briefs were submitted; a hearing was held June 1 – June 15, 1992; and, thereafter, the parties filed proposed Findings of Fact and Conclusions of Law. The Court heard argument on August 7, 1992 and the parties were, then, permitted to supplement the record.

In broad outline, Plaintiffs' assertions are as follows: that a pattern of prevarication and dissembling on the crucial issue of Volkswagen Aktiengesellshaft's true relationship to Audi NSU and its predecessor have characterized the case from its inception. Chronologically, they assert that upon the advice of Defendants' counsel, Myron Shapiro (by way of Defendants' local counsel), Plaintiffs' attorney dropped Volkswagen Aktiengesellshaft (VWAG) as a named party Defendant from the suit. *See*, Trial Exhibits 47, 55, 56; Trial Transcript p. 73: 7-12, 271:1-273:2. Plaintiffs charge that the scheme to dissemble continued through the pre-trial discovery phase of the underlying case when Jefferson Greer (Plaintiffs' attorney, at that stage of the case) sought to elicit information on the development of the Audi 100, the relationship between Audi NSU and VWAG and the corporate history of Audi NSU through interrogatories and, then, depositions. That effort was frustrated, say Plaintiffs, by a concerted effort (on the part of Defendants through their attorney, Mr. Shapiro) of non-disclosure and misinformation.[1] Plaintiffs charge that the subterfuge

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[1] *See*, Trial Transcript, pp. 273:23-274:13; 273:15-274:14; 276:20-23; 865:18-23; 158:13-24; 257:21-258:2; 260:13-15; 189:7-190:25; 193:24-194:17; 277:9-278:8; 282:1-5; 277:2-8; 279:9-15; 413:23-417:9; 274:15-17; 162:7-19; 740:13-741:16;

proceeded apace during the trial when Mr. Shapiro made misleading, incomplete and/or untruthful representations to this Court regarding the corporate relationship between VWAG and Audi NSU (and its predecessor, Auto Union). In the alternative, Plaintiffs allege that Mr. Shapiro was less than honest about his knowledge of that relationship.[2] Plaintiffs assert that based upon these alleged misrepresentations, the Court excluded the NHTSA submissions identified above. Plaintiffs assert that Mr. Shapiro's testimony during the June, 1992 hearing casts an even deeper shadow on his credibility.[3] In sum, Plaintiffs argue that the evidence adduced establishes a scheme to suppress information vital to its case as it pertains to the corporate relationships and, therefore,

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174:20-175:24; 189:17-192:7; 234:17-19; 243:1-17; 740:13-24; 282:1-5; 444:22-447:17; 762:1-4; 809:3-6; 762:4-6; 451:1-6; 510:1-518:7; 532:14-537:17; 649:2-12; 985:1-24; 862:22-863:7; 865:16-23; 974:4-988:7; 992:18-993:4; 963:2-967:16; 282:1-5; 100:18-21; 101:10-14; 102:6-14; and Trial Exhibits 99 (pp. 30, 32-39, 71, 98-99); 044; 046; 058; 048; 050; 064; 069; 066; 067 (p. 5); 59; 65; 57.

[2] *See*, Trial Transcript pp. 130-135; 305:10-17; 338:20-341:20; 304:22-24; 305:6-7; 325:4-5; 325:15-18; 339:1-5; 339:14-340:15; 340:22-341:3; 341:18-20; 344:15-24; 514:1-12; 498:4-25; 554:16-18; 554:10-557:7; and Trial Exhibit 001; 1001.

[3] *See, e.g.*, Trial Transcript pp. 682:5-14; 483:11-484:1; 1085:6-21; and Trial Exhibits 80,099 (p. 156:3-24); *see, also*, Trial Transcript pp. 786; 24-787:2; 438:5-18; 435:19-22; 437:23-438:18; 777:23-778:17; 788:8-795; 118:3-8; 118:11-119:7; 789:20-793:12; 1055:1-1064:5; 1066:15-1067:16; 1114:15-18; 1114: 1-1117:11; 1117:4-7; 1117:21-22; 791:22-792:5; 1119:12-1120:24; 1067:10-16; 1116:5-1117:11; 1053:4-7; 1052:9-13; 1106:18-1109:11; and Trial Exhibits 73 (pp. 7, 11, 27-28); 105; 106; 221 for identification; 1162.

imputed knowledge of Audi NSU vis 'a vis the allegedly defective design of the gas tank and fuel system of the Audi 100 LS.

Rule 60(b) provides, in part, for relief from judgment on the grounds of mistake or excusable neglect; newly discovered evidence; fraud, misrepresentation or other misconduct of adverse party *if* the action is brought within one year after the judgment is entered. It also provides a savings clause: "this rule does not limit the power of a court to entertain an independent action . . . to set aside a judgment for fraud upon the court." Rule 60(b). Based upon the one year rule, this Court's inquiry will not encompass fraud and/or misrepresentation, generally, but will be strictly limited to the savings clause issue of fraud upon the Court.

At the outset it is imperative to describe what manner of beast is a "fraud on the court" and to identify the degree of proof by which it must be shown. It is therefore instructive to begin with relevant case law. The progenitor of fraud on the court cases is *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 64 S.Ct. 997 (1944); *rehearing denied*, 322 U.S. 772, 64 S.Ct. 1281 (1944). There, the Supreme Court invoked common law and held that in spite of "the deeply rooted policy in favor of repose of judgments" there were no time limitations imposed on the power of the Court to set aside a judgment procured by a fraud upon the court. *Id.* 64 S.Ct. 1000. In that case, the Court found a "deliberately planned and carefully executed scheme [by an attorney: an officer of the Court] to defraud not only the Patent Office but the Circuit Court of Appeals." *Id.* Cases brought following adoption of Rule 60(b), as amended in 1946, continue to rely on the

reasoning set forth in *Hazel-Atlas*: that a charge of fraud on the Court must be evidenced by the most egregious assaults on the judicial machinery. For an analysis of the evolution of that rule, *see Averbach v. Rival Manufacturing Co.*, 809 F.2d 1016, 1020-1022 (3rd Cir. 1987). In *United States v. International Telephone & Telegraph Corp*, 349 F.Supp. 22, 29 (D. Conn. 1972), aff'd without opinion, 410 U.S. 919, 93 S.Ct. 1363, 35 L.Ed.2d 582 (1973), the district court opined:

> Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute fraud on the court . . . Less egregious misconduct such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court . . . (citations omitted).

Moreover, the requisite misconduct must be shown by a high degree of proof. One who asserts 60(b) fraud has the burden of proving it by clear and convincing evidence. *Ervin v. Wilkinson*, 701 F.2d 59 (7th Cir. 1983); *Harris v. Mapp*, 719 F.Supp. 1317 (E.D. Va. 1989); *Rozier v. Ford Motor Co.*, 573 F.2d 1332 (5th Cir. 1978), *rehearing denied* (1978).

In *Bulloch v. United States*, 95 F.R.D. 123 (D. Utah 1985) sheep owners sued the government for damages allegedly resulting from atmospheric testing. The judgment in favor of the government was set aside for fraud upon the Court. In reversing, the Tenth Circuit held that information allegedly withheld by the government was available to the plaintiffs in the original action. *Bulloch v.*

United States, 763 F.2d 1115, 1118 (10th Cir. 1985). In so ruling, the Circuit declared:

> This case demonstrates the very good reasons why judgments should be final and should not be disturbed. The plaintiffs to prevail must have shown by clear and convincing evidence that there was a fraud on the court, *and all doubts must be resolved in favor of the finality of the judgment.*

Id. at 1121 (emphasis added). The Court went on to explicate the rule:

> Fraud on the court . . . is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury. It has been held that allegations of nondisclosure in pretrial discovery will not support an action for fraud on the court . . . It is thus fraud where the court or a member is corrupted or influenced or influence is attempted or where the judge has not performed his judicial function – thus where the impartial functions of the court have been directly corrupted.

Id. at 1121 (citations omitted). Thus, our Circuit has spoken. And the Fifth Circuit has declared, "The mere nondisclosure to an adverse party and to the court of facts pertinent to a controversy before the court does not add up to 'fraud upon the court' for purposes of vacating a judgment under Rule 60(b)." *Kerwit Medical Products, Inc. v. N & H Instruments, Inc.*, 616 F.2d 833, 837 (5th Cir. 1980) *quoted in, Wilson v. Johns-Manville Sales Corp.*, 873 F.2d 869, 872 (5th Cir. 1989). In *Wilson* defendants failure to disclosure the fact that they knew the dangers of asbestos

for literally decades was not grounds for a 60(b), fraud on the court, claim. *Id.* 871, 873.

And in *Gleason v. Jandrucko*, 860 F.2d 556 (2nd Cir. 1988) the Second Circuit ruled that neither perjury of a witness nor nondisclosure during pre-trial discovery will support a claim under the 60(b) savings clause. *Id.* at 559.

> Perjury and fabricated evidence are evils that can and should be exposed at trial, and the legal system encourages and expects litigants to root them out as early as possible.

Great Coastal Express, Inc. v. International Brotherhood of Teamsters, 675 F.2d 1349, 1357 (4th Cir. 1982), *cert. denied*, 459 U.S. 1128, 103 S.Ct. 764 (1983), *quoted in Gleason*, at 560.

However, in certain circumstances, attorney misconduct may constitute a fraud upon the Court. While it is incumbent upon an attorney to

> represent his client with singular loyalty, that loyalty obviously does not demand that he act dishonestly or fraudulently; on the contrary his loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court. And when he departs from that standard in the conduct of a case, he perpetrates a fraud upon the court.

7 Moore, Federal Practice ¶ 60.33 at 513 (1971 ed.).

The seminal case finding sufficient proof of attorney misconduct amounting to fraud on the court is the *Hazel Atlas* case discussed above. There an attorney presented as an article written by an expert, a piece he had himself written in support of his client's patented process. The

article was submitted to the Third Circuit as authority for his client's position in a patent infringement case. *Id.* 322 U.S. 240, 41; 64 S.Ct. 998-999. The Court found the attorney was implicated in "a deliberately planned and carefully executed scheme" which amounted to a fraud upon the Court. *Id.* 64 S.Ct. 1000. By contrast, in *Kupferman v. Consolidated Research & Mfg. Corp.*, 459 F.2d 1072 (2d. Cir. 1972) the failure of an attorney of an underwriter's receiver to notify the court of a release executed by the underwriter was susceptible of two different interpretations; therefore fraud on the court premised upon attorney misconduct would not lie.

And in *S.E.C. v. ESM Group, Inc.*, 835 F.2d 270 (11th Cir. 1988) the court held that even if an investor's attorney was aware of his client's "massive securities fraud" prior to judgment, his failure to disclose the information which would certainly have been beneficial to the opposing party, did not amount to fraud on the court. Absent a showing that the attorney assisted in the securities fraud, the court declined to find a 60(b) situation. *Id.* at 274.

Finally, in *H. K. Porter Co., Inc. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115 (1976) defendant alleged that plaintiff's attorneys were aware of and sponsored plaintiff's nondisclosure of discoverable and requested documents in violation of court order. The court found that the allegations were unsupported by the evidence.

The Court has reviewed the record and, most particularly, the evidence presented by Plaintiffs/Movants herein. Indeed, the Court was compelled to study in some depth the effective and exhaustive case prepared by Plaintiffs' counsel to ascertain its proper interface with

the relevant law. As a preliminary matter, the Court must concede that had it been apprised of the material contained in Plaintiffs' Proposed Findings of Fact and Conclusions of Law (FF/CL) filed July 27, 1992 at pp. 38-42 (nos. 53-55) the submissions exhibits at issue would most assuredly have been admitted into evidence. Indeed, it seems fair to say that if the relevant corporate relationships set forth in Plaintiffs' FF/CL, cited above had been on record, VWAG would have been joined as a party defendant. And the Court so finds. However, nowhere in this meticulously prepared and effectively argued claim does there appear clear and convincing evidence that Defendants' counsel was involved in a "deliberately planned and carefully executed scheme" to defraud this Court through misrepresentation and nondisclosure. In the absence of such evidence, the Court is bound by the relevant case law to deny Plaintiffs' Motion. This case is, accordingly, dismissed.

ORDERED this 17th day of September, 1992.

/s/ James O. Ellison
JAMES O. ELLISON,
Chief Judge
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HARRY ROBINSON and KAY ROBINSON, husband and wife, et al.,	)	
Plaintiffs,	)	No. 88-C-367-E (89-C-604-E – Consolidated)
vs.	)	
AUDI AKTIENGESELLSCHAFT, f/k/a AUDI NSU AUTO UNION AKTIENGESELLSCHAFT, a foreign corporation, et al.,	)	
Defendants.	)	

ORDER OF DISMISSAL

(Filed Jun. 21, 1993)

Several motions pend herein: Plaintiffs' Motion for Clarification (docket #286); Plaintiffs' Motion for Reconsideration (docket #287); and Plaintiffs' Motion for status conference (docket #288). The motions will be considered *ad seriatim*.

Motion for Clarification of Court's Administrative Closing Order in Case No. 89-C-604-E or, in the Alternative, Motion to Reopen Case No. 89-C-604-E

On April 25, 1990 the Court consolidated Case No. 89-C-604-E with Case No. 88-C-367-E. On September 17, 1992, the Court administratively closed Case No. 89-C-604-E. Plaintiffs query whether the Order has any impact on Case No. 88-C-367-E. Plaintiffs' concerns are understandable. By way of reassurance, the Court should

explain that the Order was entered in an attempt to appease the Court's computerized docketing system. Case No. 88-C-367-E remains open. Plaintiffs' motion is granted in part.

Motion to Reconsider Order of March 21, 1990, and to set for Trial or in the Alternative to Transfer in the Interest of Justice

Case No. CIV-89-440 TUC RMB, filed in the United States District Court for the District of Arizona has been transferred to this court and has been docketed as 93-C-402-E. It is apparent that Plaintiffs' motion to transfer Case No. 88-C-367-E to the District of Arizona should be denied.

In the alternative, Plaintiffs ask that the Court reconsider its Order of March 31, 1990. Given the awesome procedural history of this case (and its companions: 80-C-85, 89-C-604, 88-C-1435 and, most recently, 93-C-402) a brief stroll down memory lane seems appropriate.

Case No. 88-C-85 is the underlying lawsuit for, *inter alia*, products liability. That lawsuit ended in a jury verdict for the Defendant in 1981. The case was appealed twice and final judgment by the Court was entered in 1986. *Robinson v. Volkswagen of America, Inc.*, 803 F.2d 572 (10th Cir. 1986).

Case No. 88-C-1435 was a suit by the attorneys who represented Plaintiffs in the original case alleging fraud, fraudulent concealment and negligent misrepresentation by Defendants Myron Shapiro, Herzfeld & Rubin and Volkswagenwerk AG. It was consolidated with this case.

Case No. 89-C-604-E is a suit by Plaintiffs herein petitioning the Court to set aside the judgment in Case No. 80-C-85-E for fraud upon the court. That case was also consolidated with this case, as stated above. The Second Amended Complaint in this case asserts claims for 1) products liability, negligence and breach of warranty against VWA; 2) fraud against VWAG and Hertzfeld & Rubin and 3) legal malpractice against Plaintiffs' attorneys in the underlying case.

Plaintiff's motion in limine dated July 21, 1989 (docket #113 in 88-C-367-E) is in the nature of a proposal for determining Plaintiffs' claim for damages arising from the fact that certain evidence was excluded from the trial allegedly because of Defendants' acts. Plaintiffs assert that no only did they endure pain and suffering as a consequence of losing the underlying lawsuit because of Defendants' fraud, but they also suffered: 1) the loss of a favorable verdict because of the excluded evidence and 2) the lost value of the likelihood of winning the lawsuit had the evidence been admitted. And proof of these latter two elements of damages could be proved, the Plaintiffs explain, by either a retrial of the underlying case or a trial of expert testimony premised upon the "Loss of Chance Doctrine" espoused by the Oklahoma Supreme Court in a medical malpractice case. *McKellips v. Saint Francis Hosp., Inc.*, 741 P.2d 467 (Okla. 1987). These two theories need not detain us because the Court has previously held that the underlying case would *not* be retried and the court declines to extend the Loss of Chance Doctrine from a medical malpractice setting to the instant situation which is readily distinguishable. The Court also declines to adopt a hybrid approach also suggested by Plaintiffs.

In any case, and to proceed with the chronology, the Magistrate's Discovery Order filed August 22, 1989 (docket #137) states in pertinent part:

> As to the Motion in Limine (#113) of Plaintiffs relating to a determination of the matter by which damages in Plaintiffs' claims can be determined, this motion will be premature if the Court adopts the Magistrate's recommendation to bifurcate liability and damages. Such motion may be reurged in the event Plaintiffs establish liability . . . The Magistrate recommends that these consolidated cases, *Robinson v. Audi Volkswagenwerk AG*, No. 88-C-367 and *Greer and Greer v. Shapiro*, No. 88-C-1435-E be bifurcated and that the issue of liability be dealt with first and the issue of damages reserved for future decision . . . The Magistrate also recommends that Case No. 88-C-1435 be dismissed by oral stipulation of counsel. Greer and Greer will proceed with their allegations of fraud and fraudulent concealment as a cross-claim in Case No. 88-C-367-E.

On March 21, 1990 the Court entered an Order adopting the Magistrate's report and recommendation and holding Plaintiffs' Motion in Limine in abeyance pending determination of liability.[1] The Court also declared that:

> [D]isputed issues of material fact exist regarding representations made to Plaintiffs' attorneys in the first lawsuit which led to the dismissal of Volkswagenwerk AG from the first lawsuit

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[1] On April 25, 1990 this March 21, 1990 Order was amended in particulars not relevant to this discussion.

> . . . This Court already has ruled that the previous products liability action will not be relitigated here. This action concerns only the issue of fraud and other intentional torts.

Then, on April 25, 1990, the Court entered an Order in Case No. 89-C-604-E consolidating its action for fraud with that of Case No. 88-C-367-E. In that Order the Court opined that the allegations of "a scheme by VWAG, its subsidiaries and its attorneys, to conceal or obscure the relationship between VWAG and Audi and to thereby prevent any admissions of VWAG from being introduced into evidence against Audi at the previous trial" and the allegations that "the attorneys for Defendants lied about the true relationship between VWAG and, Audi and VWOA to prevent the NHTSA submissions from being admissible against Audi and VWOA" were sufficient to state a claim under Rule 60(b) (citing *Bullock v. United States*, 763 F.2d 1115 (10th Cir. 1985); *Auerbach v. Rival Mfg. Co.*, 809 F.2d 1016 (3rd Cir. 1987).

And on January 28, 1991, the Court stated that "the case shall be heard as a Rule 60(b) F.R.C.P. bench trial, wherein it will determine whether the judgment rendered previously should be set aside for fraud upon the Court."

The Circuit, in its Order of August 1, 1991, held that absolute immunity would not preclude Plaintiffs' and Greer and Greer's claims against Defendants' attorneys for allegedly fraudulent statements made during discovery and trial of the underlying case. The Circuit was also asked to consider whether Rule 60(b) provided the "exclusive remedial framework" for this claim and, if so, whether Rule 60(b)(3) barred the action as coming too

late. The Circuit declined to make an initial ruling on this nonappealable issue:

> Moreover, in light of the pending claims and cross-claims, we think that the Rule 60(b) issues may become clearer once the operative facts are determined. This will require the district court to carefully assess and characterize the evidence concerning the alleged fraudulent scheme to deprive the plaintiffs of discovery information and damages.

And, finally, in its Order and Judgment of September 17, 1992 (docket #273 at p. 5) this Court stated:

> Rule 60(b) provides, in part, for relief from judgment on the grounds of mistake or excusable neglect; newly discovered evidence; fraud, misrepresentation or other misconduct of adverse party if the action is brought within one year after the judgment is entered . . . Based upon the one year rule, this Court's inquiry will not encompass fraud and/or misrepresentation, generally, but will be strictly limited to the savings clause issue of fraud upon the Court.

This brings us full circle to Plaintiffs' Motion to Reconsider (docket #287) wherein Plaintiffs request an address of its Motion in Limine, *supra*. As previously stated the Court declines to adopt Plaintiffs' suggestions for the reasons set forth above. However given the ambiguous, if not conflicting, language in the Orders quoted above regarding the threshold questions of the applicability of Rule 60(b) Fed.R.Civ.P. to Plaintiffs' claims for common law fraud, the Court finds it appropriate to address those questions. First, the Court finds as a matter of law, that Rule 60(b) is Plaintiffs' only recourse for support of its

common law fraud claims. Next, the Court finds as a matter of fact that the common law fraud issues were raised more than one year after the judgment was taken and all appeals were exhausted (*supra*, at p. 2). Rule 60(b) Fed.R.Civ.P. provides in relevant part that:

> On motion and upon such terms as are just, the Court may relieve a part of a party's legal representative from a final judgment . . . for the following reasons: . . . (3) fraud . . . misrepresentation, or other misconduct of an adverse party . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2) and (3) not more than one year after the judgment order or proceeding was entered or taken.

Then, subsection (b) provides a savings clause which states, in part:

> This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment . . . or to set aside a judgment for fraud upon the court.

Clearly, the common law fraud claims come too late if Plaintiffs are bound by the one year rule. Under any reasonable construction of subsection (b) could Plaintiffs' common law fraud claims be maintained under Rule 60(b)(6)? The Court finds that they could not. While not all courts agree that subsections (b)(1) – (b)(6) are mutually exclusive, the Court has found no case which permits a claim specifically barred by the one year rule, that is, subsections (b)(1) – (b)(3), from maintaining a claim under (b)(6) in order to bypass the one year limitation. *See e.g., Murray v. Ford Motor Co.*, 770 F.2d 461 (5th Cir.

1985); *In re Four Seasons Securities Laws Litigation*, 502 F.2d 834, 841 (10th Cir. 1974). The Court, therefore, concludes that no claims for common law fraud will lie at this point.

Motion for Status Conference

Plaintiffs' motion for status conference will be denied as unnecessary and moot.

One final issue which is intermittently raised by the parties: the matter of the Court's recusal. A cursory examination of the legal authorities convinces the Court that recusal would be inappropriate under the circumstances. *See, United States v. Liteky*, 973 F.2d 910 (11th Cir. 1992).

In sum, Plaintiffs' Motion for Clarification is granted in part; Plaintiffs' Motion for Reconsideration is denied; Plaintiff's Motion for Status conference is denied.

This matter is hereby dismissed.

So ORDERED this 18th day of June, 1993.

/s/ James O. Ellison
JAMES O. ELLISON,
Chief Judge
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HARRY ROBINSON and KAY ROBINSON, husband and wife; EVA MAY McCARTHY; and GEORGE SAMUEL ROBINSON, Plaintiffs, vs. VOLKSWAGENWERK AG, a foreign corporation; GREER & GREER; and HERZFELD & RUBIN, a foreign professional corporation, Defendants.	)	No. 88-C-367-E (89-C-604-E – Consolidated)

ORDER

(Filed Jul. 2, 1993)

The Order of Dismissal dated June 18, filed June 21, and entered on the docket June 22, 1993, is hereby amended by striking the words, "and all appeals were exhausted (*supra*, at p. 2)" in line 27 of page 6 of that Order.

So ORDERED this 2nd day of July, 1993.

/s/ Thomas R. Brent
for JAMES O. ELLISON,
Chief Judge
UNITED STATES
DISTRICT COURT

(2)

Supreme Court, U.S.
FILED
NOV 22 1995
CLERK

No. 95-650

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HARRY ROBINSON, KAY ROBINSON, EVA MAY McCARTHY AND GEORGE SAMUEL ROBINSON,
Petitioners,

v.

AUDI AG
(f/k/a/ AUDI NSU AUTO UNION AKTIENGESELLSCHAFT)
AND VOLKSWAGEN OF AMERICA, INC.,
Respondents.

and

HARRY ROBINSON AND KAY ROBINSON; EVA MAY McCARTHY; AND GEORGE SAMUEL ROBINSON,
Petitioners,

v.

VOLKSWAGENWERK AG AND HERZFELD & RUBIN, P.C.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Tenth Circuit

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BEST AVAILABLE COPY

36pp

QUESTIONS PRESENTED

1. After plenary trial on plaintiffs' charges of "the involvement of an officer of the court in 'a carefully planned scheme calculated to deceive the court,'" to which the judge allegedly defrauded responded with the single dispositive finding that "nowhere . . . is there clear and convincing evidence that defendants counsel was involved in a 'deliberately planned and carefully executed scheme to defraud the court' through misrepresentation and nondisclosure," does the record present anything other than the direct factual rejection of plaintiffs' claims, mooting any issues of law which the Petition would raise?

2. Does this Court have any dispositive issue before it as to the specific mental state needed for attorney statements to constitute "fraud upon the court" where the record, as here, contains no findings that the attorney statements in question were false, and in fact compels the conclusion that they were both true and spoken in good faith?

STATEMENT PURSUANT TO RULE 29.1

Respondent Audi AG ("Audi"), named as "Audi NSU Aktiengesellschaft," is a corporation organized and existing under the laws of the Federal Republic of Germany. Audi's shares are publicly traded; however, a substantial majority of such shares is owned by respondent Volkswagen AG ("VWAG"), named herein as "Volkswagenwerk Aktiengesellschaft", another German corporation, the shares of which are publicly traded. Appellee Herzfeld & Rubin, P.C. is a New York Professional Corporation engaged in the practice of law, all shares of which are owned by members of the Firm.

Major subsidiaries and affiliates of VWAG in which VWAG has a substantial interest include the following:

AUDI AG
AUTOGERMA S.p.A.
Autolatina Argentina S.A.
Autolatina Brasil S.A.
Autolatina Comercio, Negocios e Participacoes Ltda.
Coordination Center Volkswagen S.A.
Europcar International S.A.
Financiera Seat, S.A.
InterRent-Europcar Autovermietung GmbH
Seat Leasing GmbH
Seat Motors International B.V.
Seat Kredit Bank GmbH
Shanghai-Volkswagen Automotive Company
Sociedad Espanola de Automoviles de
TAS Tvornica Automobila Sarajevo GmbH
Turismo, S.A.
V.A.G France S.A.
V.A.G Financement S.A.
V.A.G Sverige AB
V.A.G Transport GmbH & Co. OHG

V.A.G Bank GmbH
V.A.G. LEASING GmbH
Volkswagen of America, Inc.
Volkswagen of Nigeria Ltd.
Volkswagen Canada Inc.
Volkswagen Investments Ltd.
Volkswagen International Finance N.V.
Volkswagen Bruxelles S.A.
Volkswagen Audi Nippon K.K.
Volkswagen de Mexico, S.A. de C.V.
Volkswagen of South Africa (Pty.) Ltd.
VOTEX GmbH
VW Credit, Inc.
VW-GEDAS & Co. Projektmanagement OHG

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STATEMENT OF THE CASE

Petitioners seek to raise two issues. First, they ask this Court to promulgate, for all cases, a talismanic verbal formula by which to characterize the precise state of mind needed for a false statement by an attorney to constitute "fraud on the court." They also seek to explore the available remedies where such misconduct is demonstrated. Pet. at i.

For these issues to be properly before this Court, the record must establish, at a minimum, that the relevant statements to the district court in this case were false. In an effort to meet this requirement, Petitioners contend that "there is no dispute" that defense counsel's representation that VWAG had "nothing whatever to do" with the plaintiffs' Audi 100LS vehicle "was false in material and significant respects." Pet. at 23. The record, however, is explicitly to the contrary.

As the Court of Appeals pointedly noted, the record not only contains no finding of falsity but supports both the truth and the good faith of the relevant attorney statements:

> . . . [T]he district court made no finding that the representations made by Audi's attorney were false. Although plaintiffs argue that the statement that Volkswagen AG "had nothing whatever" to do with the design or manufacture of the Audi 100 LS is "just not true," such a representation can be reasonably viewed as a true statement of the legal relationship between these companies. [Defense counsel's] comments could clearly be considered a good faith legal argument.

App. at 20-21 n.6. This comprehensive alternate ground for the decision below is sufficient in itself to dispose of the Petition.

The second fundamental deficiency of the Petition is its *ex post facto* effort to minimize plaintiffs' factual claims as charging mere recklessness or gross negligence. This gambit cannot be squared with plaintiffs' steadfastly maintained claims of an elaborate, multifaceted "scheme and plan" which was "designed precisely to prevent the Court from performing its function of impartially adjudging cases." *Infra* at n. 3. Indeed, in a prior submission to this Court, Petitioners directly charged that their adversaries had "knowingly and intentionally violated the law." *Herzfeld & Rubin, P.C. v. Robinson*, (No. 91-715), Brief in Opposition to Petition for Certiorari ("*H&R v. Robinson*, Opp.") at 13. Even on the present Petition, plaintiffs maintain that the charged acts by defense counsel "were specifically designed to suppress" the relevant facts. Pet. at 4. Against this background, the district court's dispositive finding — "[N]owhere . . . does there appear clear and convincing evidence that defense counsel was involved in a 'deliberately planned and carefully executed scheme' to defraud this Court through misrepresentation and non-disclosure" (App. at 47) — was a factual finding, pure and simple, which the Court of Appeals found "directly responsive to the claim asserted by plaintiffs." App. at 21. On this ground as well, the Petition fails at the threshold.

Background

In the first decade of this litigation, from 1977 to1986, plaintiffs lost on the merits at trial and in two appeals to the Tenth Circuit. *Robinson v. Audi NSU Auto Union* 739 F.2d 1481 (10th Cir. 1984); *Robinson v. Volkswagen of America, Inc.*, 803 F.2d 572 (10th Cir. 1986). Since 1987, they have pursued a two-pronged strategy to continue this suit despite the twice

affirmed adverse judgment. First, they sought to relitigate the underlying action under Oklahoma common law, notwithstanding the prior judgment, by suing opposing counsel and the corporate parent of the defendants in the underlying suit, alleging the same causes of action on which they previously lost, plus alleged fraud perpetrated against them by their adversaries in securing that outcome. The second prong of their attack took the form of an independent action under Rule 60(b), Fed.R.Civ.P., against their former trial adversaries, seeking relief from the previously entered final judgment based upon alleged "fraud on the court."

The present Petition challenges the Tenth Circuit's affirmance on appeal of the district court's dispositive finding that these charges, though sufficient in law, were comprehensively unproven. Petitioners also question the Tenth Circuit's application of traditional principles of claim and issue preclusion under doctrines of *res judicata* and collateral estoppel to foreclose their attempt to use a purported Oklahoma law common law fraud action as a device to avoid the requirements of Rule 60(b).

A detailed history of the underlying litigation is set forth in the circuit court's decisions. In the interest of brevity, we incorporate these passages by reference. App. 3 - 6; 25 - 27.[1] The following factual statement, fulsome as it may appear, highlights only those aspects of that history which we view as having been omitted or misstated by petitioners or which otherwise bear directly on our opposition to the Petition.

The history of plaintiffs' charges makes it inescapably clear that plaintiffs, at all times until they discovered that

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1. The appendix to the Petition is cited as "App. __," and portions of the record in the Court of Appeals are cited as in the decisions below.

they had lost the case, charged defendants with exactly what the district court ultimately found they had failed to prove — a "'deliberately planned and carefully executed scheme' to defraud the court through misrepresentation and non-disclosure." The district court's rejection of that charge in almost the exact words in which plaintiffs advanced it was a simple, garden variety factual finding, on the basis of which one party to a litigation prevailed. The Petitions' effort to concoct "certworthy" issues of law from their loss at trial on the facts merits no consideration from this Court.

The Complaint — "A Scheme and Plan to Prevent the Disclosure of the True Facts" — Motion to Dismiss Denied — Allegations That "The Attorneys For the Defendants Lied"

According to the complaint,[2] each of the multitude of wrongs which plaintiffs charged the defense with having committed was part of a deliberately conceived "scheme and plan" to suppress the "true facts" concerning the corporate relationship between Audi and its parent VWAG. (Aplt.App. at 8, ¶¶18-20)[3] The complaint made the extraordinary charge

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2. Unless otherwise noted, references to pleadings and submissions below relate to plaintiffs' action for fraud on the court, No. 92-5238 in the Tenth Circuit, which the Court of Appeals found to be factually identical to plaintiffs' action for common law fraud. No. 93-5168 below.

3. 18. [Defense counsel] made false representations concerning the design and the development of the Audi 100 LS and the relationship of VWAG to that design and to Auto Union GmbH and Audi NSU . . .. The true facts are set forth with particularity

(continued...)

that one individual attorney, a member of the defense team, was both the architect and linchpin of these sophisticated, single-minded and indeed virtually clairvoyant machinations, which extended over a three year period and involved a broad array of acts of professional misconduct in both the Oklahoma and federal court systems. (*Id.* ¶¶ 21-65) Specific allegations concerning the acts, statements and state of mind of this lawyer appear over thirty times in the complaint.[4]

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3. (...continued)

> in Paragraphs 22 through 37 herein. The representations are set forth in particularity in Paragraphs 46 through 51 herein. The knowledge of the defendants and H&R, their attorneys, . . ., are set forth in Paragraphs 38 through 45 herein.
> 19. These false representations were directed at the judicial machinery itself and were a fabrication of evidence by a party in which an attorney is implicated. . . . This fraud . . . was designed precisely to prevent the Court from performing its function of impartially adjudging cases. . . .
> 20. The false representations were made as part of a scheme and plan to prevent the disclosure of the true facts concerning the relationship of VWAG to the design and manufacture of the Audi 100LS and its relationship with Auto Union GmbH and Audi NSU. In addition to the representations made by [defense counsel], the scheme and plan was implemented through making false and fraudulent answers to interrogatories and in discovery. The acts which were performed to implement this scheme and plan are set out particularly in Paragraphs 52(e) and 54 through 65 herein.

4. Complaint (Aplt.App. at 1-39) ¶14, ¶18 (3 times), ¶20 (continued...)

Confirming the inherently intentional nature of the "scheme or plan," the complaint directly alleges that "This fraud . . . was designed precisely to prevent the Court from performing its function of impartially adjudging cases." (*Id.* ¶19)[5]

The district court upheld the legal sufficiency of plaintiffs' charges from the start of the case. In its own words, ". . . the [district] Court opined that the allegations of 'a scheme by VWAG, its subsidiaries and its attorneys . . .' and the allegations that 'the attorneys for defendants lied . . .' were sufficient to state a claim under Rule 60(b)." App. at 52 As plaintiffs stated to this Court, this was a holding that "if the facts alleged [in the complaint] are true, they constitute fraud on the court." *H&R v. Robinson*, Opp. at 2.

Opposition to Certiorari in No. 91-715 — Defense Counsel "Knowingly and Intentionally Violated the Law."

Defendants' challenge to other aspects of the above-quoted ruling led to a petition for certiorari, No. 91-715 in this Court, on the issue of civil damage immunity to defense counsel. In their opposition to that petition, plaintiffs devoted a full page of their Brief in opposition to a complete quotation

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4. (...continued)
(specifically identified as an architect and/or instrument of the alleged "scheme or plan"), heading before ¶¶ 38-45, ¶43 (twice), ¶44 (H&R charged with various alleged categories of "knowledge" of Shapiro), ¶45 (nine separately designated subcategories of Shapiro's alleged knowledge, imputed to H&R), heading before ¶¶46-51, ¶46, ¶47 (twice), ¶48 (twice), ¶49 (twice), ¶50 (four times), ¶51, ¶52, ¶57(twice).

5. Accord, Pet. at 4 ("The misrepresentations and omissions were designed to suppress the role of . . . VWAG . . .")

of the district court's characterization of their charges of a "scheme or plan" in the course of which "throughout discovery and at trial, the attorneys for defendants lied." At the conclusion of the quotation, plaintiffs stated that "This the factual predicate upon which this case stands." *H&R v. Robinson*, Opp. at 3-4. This was not an isolated reference. The "Question Presented" in their brief directly accused the defense of "a broad fraudulent scheme which includes 1) lying by the attorney directly to the judge as well as to opposing counsel; 2) false answers to crucial discovery requests; and, 3) other acts of misconduct outside the courtroom . . ." *Id* at i. The brief concluded by directly charging that defense counsel had "knowingly and intentionally violated the law." *Id.* at 13. This Court denied the writ. *Herzfeld & Rubin, P.C. v. Robinson*, 112 S.Ct. 1160 (1992)

Pre-Trial Contentions — All Claimed Acts of Misconduct Were "Part of a Scheme and Plan to Deceive the Court . . . and "Designed to Conceal or Obscure" the Relevant Facts.

In the Pre-trial Order, plaintiffs reiterated their factual claim that all alleged acts of misconduct, regardless of the specific state of mind involved in any particular incident, were part of a "scheme and plan" knowingly and intentionally "designed" to subvert the integrity of the judicial process:

> 1. Plaintiffs contend that Defendants, acting by and through their attorneys, . . . made false statements or made statements which omitted to state material facts, which omissions made the statements materially false and misleading in answering interrogatories and in representations made . . . to the court.

2. Plaintiffs contend that Defendants knew that the answers and representations were either (a) untrue, or (b) in the exercise of reasonable diligence, would be found to be untrue, or (c) made with reckless disregard for the truth, or (d) were made in the context of volunteering information which omitted to state material facts, which omissions made the statements materially false and misleading.

3. *Plaintiffs contend that the representations to the court and answers to the interrogatories were part of a scheme and plan to deceive the court . . . and designed to conceal or obscure the relationship between VWAG and Auto Union or Audi NSU* and thereby prevent any admissions of VWAG from being introduced into evidence against Audi at the first trial.

Aples. Supp. App. at 152. (emphasis added) The alleged "scheme and plan" by the defendants' attorney remained the indispensible core of plaintiffs' claims.[6]

Proposed Findings and Conclusions After Trial — "The Record Establishes That the Court Was Intentionally Lied To," and shows "The Involvement of an Officer of the Court in 'A Carefully Planned Scheme Calculated to Deceive the Court'"

Plaintiffs' proposed findings and conclusions, submitted after trial on the merits, maintained their pre-trial position in

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6. Recklessness was mentioned solely as a subcomponent of one possible alternative state of mind with which some false statements may have been committed within the framework of the deliberately designed overall "scheme and plan." *Id.* ¶2(d). Even in that context, plaintiffs charged the alleged wrongdoers with actual knowledge of their recklessness and the role which their acts played in the "scheme and plan."

every respect. Factually, plaintiffs adhered to their charges of a "scheme and plan," specifically repeating, as a proposed finding of fact, the complaint paragraph integrating all charged misconduct into the scheme and plan. (App. Supp. App. at 1520 ¶ 58.) The alleged acts comprising that "scheme and plan," necessarily required deliberate planning and execution (Aple. Supp. App. at 1520-34, *passim.*)(*e.g.* "false instructions," "false objections," (*id.* ¶ 61) the attorney's statements to the court "were designed to . . . conceal the [Audi\VWAG] relationship." (*Id.* ¶ 62))

Plaintiffs specifically claimed to have proven "the involvement of an officer of the court in 'a carefully planned scheme calculated to deceive the court:'"

> 4. The evidence establishes that the Court was intentionally lied to and that those lies were relied upon by the Court when it excluded Exhibits 45-49 in the underlying case. . . . [T]hat is the equivalent of the destruction of evidence . . . Such fraud is directed to the judicial machinery itself. When that occurs, as here, it is the equivalent of and at the same level as bribery of a judge or bribery of a jury. . . .
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> 6. An attorney is an officer of the court. While he should represent his client with singular loyalty, that loyalty obviously does not demand that he act dishonestly or fraudulently; on the contrary, his loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court. When he departs from that standard in the conduct of a case he perpetrates a fraud upon the court.
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> 7. *The involvement of an officer of the court in "a carefully planned scheme calculated to deceive the court"* is the type of misconduct that warrants . . . the entry of a judgment in favor of the plaintiff when, as here, the fraud

> is perpetrated by the defense. . . . *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944)

(Aple. Supp. App. at 1538-40) (emphasis added)(citations other than *Hazel-Atlas* omitted).

The District Court's Dispositive Factual Finding — "Nowhere . . . Does There Appear Clear and Convincing Evidence That Defendants' Counsel Was Involved in a 'Deliberately Planned and Carefully Executed Scheme' to Defraud this Court" — The District Court Declines to Make Factual Findings as to the Audi/VWAG Relationship

The district court found for defendants in its September 17, 1992 Order and Judgment. Nothing in the district court's review of plaintiffs' claims or of the governing law (App. at 39-46) suggests any change in the district court's view that "if the facts alleged are true, they constitute fraud on the court." *H&R v. Robinson*, Opp. at 2. However, the district court clearly and directly rejected plaintiffs' claims to have proven "the involvement of an officer of the court in 'a carefully planned scheme calculated to deceive the court:'"

> . . . [N]owhere in this meticulously prepared and effectively argued claim does there appear clear and convincing evidence that Defendants' counsel was involved in a 'deliberately planned and carefully executed scheme' to defraud this Court through misrepresentation and nondisclosure.

(App. at 47).

Immediately before its dispositive factual finding, the district court's opinion includes the following passage:

> As a preliminary matter, the Court must concede that had it been apprised of the material contained in Plaintiffs' Proposed Findings of Fact and Conclusions of Law (FF/CL), filed July 27, 1992, at pp. 38-42 (nos.53-55), the . . . exhibits at issue would most assuredly have been admitted into evidence. Indeed, it seems fair to say that if the relevant corporate relationships set forth in Plaintiffs' FF/CL, cited above had been on record, VWAG would have been joined as a party defendant. And the Court so finds.

Ibid. The district court's conclusion that the "material contained in [plaintiff's proposed findings 53-55],"[7] if true, would have affected the admissibility of the documents and the status of VWAG in the lawsuit, clearly reaffirmed its earlier ruling that plaintiffs claims, if true, stated a case under Rule 60(b). However, the district court carefully avoided making any finding as to the truth of the "material contained in plaintiffs' proposed findings 53-55]."

Plaintiffs responded to the district court's Order and Judgment by moving, post-judgment, for supplemental findings adopting their proposed findings 53-55 referenced in the district court's decision. (Aplt.App. at 179-83) The stated rationale for plaintiffs' motion was "clarification" of "what we perceive to be the thrust of [the district court's] order and judgment." (Aplt.App. at 174) The district court denied the motion. (Aplt.App. at 210) In denying plaintiffs'

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7. The proposed findings detailed plaintiffs' contentions as to the VWAG/Audi relationship. As the Court of Appeals noted, these contentions were comprehensively controverted. App at 10-11.

motion, the district court confirmed that no such findings had been intended.[8]

The Appeals and Decisions Below

Before the Court of Appeals, plaintiffs claimed to raise no challenge to the district court's finding on a factual basis, but instead assailed it as a legal ruling adopting an impermissibly narrow view of fraud on the court. As Petitioners have noted, the Court of Appeals met and disposed of this claim squarely on the law, finding that the district court's determination was not erroneous. App. at 18-20. For the reasons set forth in the body of argument, we submit that the Court of Appeals' decision was correct.

It is important to note, as the Petition does not, that the Court of Appeals identified two alternative and independently sufficient factual bases for affirmance of the district court's decision. First, the circuit upheld the district court's dispositive factual finding as "directly responsive to the claim asserted by plaintiffs:"

> Although plaintiffs now maintain that the trial court's opinion shows that it misunderstood that scope of fraud on the court, in fact the court's dispositive finding was directly responsive to the claim asserted by plaintiffs. *See* . . . Pretrial Order, Plaintiffs' Contentions, App. E, ¶ 3 ["Plaintiffs contend that the representations to the court and answers to the interrogato-

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8. See *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)("a page of history is worth a volume of logic")(Holmes, J).

ries were part of a scheme and plan to deceive the court, "][quoted *supra* at 8.][9]

In a footnote to the quoted passage, the Court of Appeals supplied a second alternative ground for affirmance on the facts:

> It is clear that the district court's ruling was based upon a lack of any intent to defraud the court. We would also point out, however, that notwithstanding the court's "finding" that had it known the corporate relationships it would have admitted the NHTSA submissions and Volkswagen AG would have been made a party, *the district court made no finding that the representations made by Audi's attorney were false. Although plaintiffs argue that the statement that Volkswagen AG "had nothing whatever" to do with the design or manufacture of the Audi 100 LS is "just not true," such a representation can be reasonably viewed as a true statement of the legal relationship between these companies.* [Defense counsel's] comments could clearly be considered a good faith legal argument.

App. at 20-21 n.6 (emphasis added).

Finally, given the fundamentally factual nature of plaintiffs' discomfiture with the outcome at trial, the Court of Appeals for good measure affirmed the district court's factual finding based upon the evidence:

> Although plaintiffs deny that they are challenging the district court's factual determination, much of their briefs is devoted to arguing that the evidence shows that Audi's attorney acted with an intent to deceive.

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9. This passage completes the paragraph in the Court of Appeals' opinion which the Petition partially quotes, Pet. at 11, without indicating the elision.

> We have reviewed the record and are satisfied that the district court's finding is not clearly erroneous.

App. at 21.

In addition to challenging the district court's dismissal of their fraud on the court claims, Petitioners appealed the district court's later dismissal of their Oklahoma common law action. (App. at 48-55) This action asserted claim in negligence, product liability and fraud against Herzfeld & Rubin, P.C. ("H&R") and VWAG, the two alleged wrongdoers who were not parties to the underlying judgment. Because the common law claims were based upon factual allegations identical to those in the fraud on the court claims, the appeals were heard together.

The Court of Appeals held that, because the judgment in the underlying product liability suit precluded their showing any damages from the loss of the prior suit, "the district court was correct insofar as it concluded that plaintiffs could not pursue their claims for damages without first seeking relief from the [underlying product liability] judgment. However, the district court was incorrect in stating that any request for relief from the judgment was barred by the one year time limit placed on motions under Fed.R.Civ.P. 60(b)." App. at 31-32.

Nevertheless, the circuit court affirmed the dismissal of the action on three additional alternative grounds. First, the Court of Appeals held that plaintiffs' tactical approach, a state law fraud claim for "damages" allegedly caused by a valid adverse judgment, was not permissible under Oklahoma law. *Id.* at 31 n.4, citing *Terrel v. Gotcher*, 174 P.2d 229, 230 (Okla. 1946). The second and third alternative grounds of affirmance were based upon issue preclusion derived from the circuit court's own review of the record. The Court of

Appeals began by holding that, if plaintiffs were taken at their word that they were not seeking relief from the product liability judgment in the underlying action, "the common law fraud claims are barred because they are inconsistent with facts underlying the prior judgment." App. at 33. Alternatively, the Court of Appeals analyzed the action as an independent action in equity for relief from a judgment, as preserved by the "savings clause" of Rule 60(b), Fed.R.Civ.P. The complete overlap between the factual allegations in the common law case and plaintiffs' charges of "fraud on the court" which had been rejected on the facts in the companion action, however, foreclosed any further proceedings:

> Clearly, the equitable principles recognized by the courts authorize relief from judgments in certain cases of fraud. [footnote] We think it cannot be fairly disputed, however, that in addressing plaintiffs' claim of "fraud on the court" in *Robinson v. Audi AG*, No. 92-5238(10th Cir.), the trial court expressly rejected as unsupported by the evidence the same factual basis now asserted by the plaintiffs as justification for avoiding the prior judgment.
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> In their "fraud on the court" complaint plaintiffs set forth allegations of fraud identical in all material respect to those asserted in the [common law] complaint . . . The trial court conducted a bench trial on those allegations and, after hearing all of the evidence, concluded that there was no clear and convincing evidence that Audi's attorney . . . engaged in a scheme to defraud the court . . . Plaintiffs have identified nothing that would indicate they did not have a full and fair opportunity to present their claims of fraud in that forum. . . The trial court's finding is simply incompatible with the allegations of fraud in the complaint against Volkswagen AG and H&R and

precludes relitigation of the fraud issue in this action. *Bulloch v. Pierson*, 768 F.2d 1191, 1193 (10th Cir. 1985)

App. at 34-35.

SUMMARY OF ARGUMENT

Petitioners lost at trial because they presented no proper proof whatever of the "shocking ubiquity of fraud" they had alleged. The effort to manufacture issues of law from their loss on the facts by palming off their discredited claims as uncontroverted fact, which the Court of Appeals saw through and rejected, unfortunately continues in the present Petition.

The district court's single dispositive finding was a purely factual determination, which was "directly responsive to the claim asserted by plaintiffs." Moreover, as the decision below reflects, "the district court made no finding that the representations . . . were false," and the attorney's statements to the district court at the first trial "could clearly be considered a good faith legal argument." App. at 20-21, n.6. There is no basis for this Court to review the unmixed factual determinations below.

The purportedly conflicting circuit court decisions referenced in the Petition are distinguishable on their facts. In addition, the Third Circuit decision which Petitioners invoke has had no discernable impact whatever upon federal jurisprudence. The Court of Appeals correctly decided this case.

The lower courts are in no need of supervisory direction with respect to fraud on the court. The reported cases conclusively demonstrate that the courts can and do readily discern and decisively redress such misconduct — provided only that it is proven.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW AFFIRMED A PURELY FACTUAL REJECTION OF PLAINTIFFS' CHARGES, AND THE RECORD COMPELS THE CONCLUSION THAT DEFENDANTS' COUNSEL SPOKE THE TRUTH IN GOOD FAITH. THERE IS NOTHING WORTHY OF THIS COURT'S REVIEW

Little need be added to the Statement of the Case on this point. As to the claims of "fraud on the court," the Court of Appeals, after pointedly noting that "the district court made no finding that the representations made by Audi's attorney were false," examined the record for itself and found substantial support both for the truth of those representations and for the good faith with which they were made. (App. 20 n.6) This conclusively establishes in this Court, as a matter of law, that the statements in question were truthful and made in good faith. For reasons which need not be belabored further, this determination disposes of the entire Petition.

Petitioners have never disputed that fraud on the court, like any fraud, must be proved by clear and convincing evidence. E.g. App. at 18, citing *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st. Cir. 1989); *Booker v. Dugger*, 825 F.2d 281, 283-84 n.4 (11th Cir. 1987), *cert. denied* 485 U.S. 1015 (1988)("[T]he policy of finality of judgments requires that [clear and convincing], if not more stringent, standards be applied to independent actions alleging fraud on the court. . ."), citing *Johnson Waste Materials v. Marshall*, 611 F.2d 593, 600 (5th Cir. 1980); *Rozier v. Ford Motor Company*, 573 F.2d 1332 (5th Cir. 1978); *United States v. Standard Oil Co. of California*, 73 F.R.D. 612 (N.D.Cal. 1977), *aff'd*, 412 U.S. 924 (1973). See generally *Woodby v. INS*, 385 U.S. 276, 285, n.18 (1966)(A requirement of clear and convincing proof, "or an

even higher one, has traditionally been imposed in cases involving allegations of civil fraud. . .")

Under the "clear and convincing" standard in fraud cases, the fact finder case must adopt any reasonable view of the evidence which negates fraud. *Tyler v. Hartford Accident & Indemnity Co.*, 195 Okl. 523, 159 P.2d 722, 725 (Okla. 945)("when a transaction is fairly susceptible of two constructions, one which will free it from imputation of fraud will be adopted"). Accord, *Barnett v. Life Insurance Co. of the Southwest*, 562 F.2d 15, 19 (10th Cir. 1977); *Federal Deposit Insurance Corp. v. Palermo.*, 815 F.2d 1329, 1335(10th Cir. 1987) ("Fraud is never presumed; the evidence must be 'clear, strong and convincing and such as to rebut every presumption of honesty and fair dealing.'") In cases under Rule 60(b), this requirement is subsumed within the broader principle that the court must resolve all doubts in favor of finality. *Bulloch v. United States*, 763 F.2d 1115, 1121 (10th Cir. 1985), *cert. denied* 474 U.S. 1086 (1986); *Great Coastal Express, Inc. v. Int'l Brotherhood of Teamsters*, 675 F.2d 1349, 1355 (4th Cir. 1982). A record that reasonably supports a factual conclusion negating fraud therefore mandates such a finding.

Below, the Tenth Circuit found substantial record support for the proposition that the attorney charged with the alleged "scheme and plan to deceive the court" spoke the truth to the court and "clearly" did so in good faith. App. at 20 n.6. This determination, which Petitioners do not challenge (or indeed even mention),[10] thereby conclusively establishes

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10. *Cf.* Pet at 21 ("Petitioners submit that there is no more fundamental and important requirement for the effective and fair functioning of the federal [judicial] system than the requirement of candor to the court.")

the truth and good faith of the key statements, mooting the entire Petition.

In addition, on the record in this case, the district court's dispositive ruling was a direct, comprehensive factual rejection of plaintiffs' claims, which they specifically articulated after trial as claiming "the involvement of an officer of the court in a carefully planned scheme to deceive the court." *Supra* at 9. A "scheme and plan," in this or any other case, can only result from conscious design and intent.[11] Even the most casual reading of the district court's decision demonstrates that, had the court found the alleged "scheme and plan" to have been proven, it would have found itself compelled to set aside the prior judgment. No legal issue can therefore arise from its purely factual rejection of the specific charges made by the plaintiffs, in virtually the exact words of their proposed post-trial conclusion on the issue, or from the affirmance of that outcome by the Court of Appeals. The factual rejection of an unproved claim, in terms "directly responsive to the claim asserted by plaintiffs," App. at 21, raises no issue which merits this Court's consideration.[12]

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11. E.g. *Random House Unabridged Dictionary* (2d. ed. 1993):
scheme . . . 1. a plan, design, or program of action to be followed; project. (p. 1713)
plan . . . 1. a scheme or method of acting, doing, proceeding, making, etc., developed in advance: *battle plans.* (p. 1480)

12. The Court of Appeals' determination as to the preclusive effect of this determination upon the common law fraud action below (App. at 35) is neither challenged, or again even mentioned, in the Petition.

II. THE CIRCUIT COURT DECISIONS WHICH PETITIONERS CLAIM CONFLICT WITH THE DECISION BELOW ARE DISTINGUISHABLE ON THEIR FACTS., AND, IN THE CASE OF THE THIRD CIRCUIT, ARE OF LITTLE IF ANY CURRENT INFLUENCE. THE COURT OF APPEALS DECIDED THIS CASE CORRECTLY.

Petitioners claim to discern major conflicts with decisions in other circuits. For the reasons discussed immediately above, we submit that any such asserted conflict is mooted by the purely factual bases upon which decisions below firmly rest. Nevertheless, just as the Court of Appeals, though under no compulsion to do so, considered and rejected the legal challenges which plaintiffs raised below, we now consider and urge this Court to reject Petitioners' claims of intercircuit conflict.

Demjanjuk v. Petrovsky

Petitioners point first to *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993), *cert. denied*_ U.S. __, 115 S.Ct. 295 (1994), as conflicting with the Tenth Circuit's view that "fraud on the court, whatever else it embodies, requires a showing that one has acted with an intent to deceive or defraud the court." App. at 19. As Petitioners observe, the Tenth Circuit took specific note of language in *Demjanjuk* that "'a scheme based on a subjective intent to commit fraud' is not required because 'reckless disregard for the truth is sufficient.'" App at 18; *Demjanjuk*, 10 F3d. at 353. The Tenth Circuit did not delve further into the matter, electing instead to adopt the view of the overwhelming majority of courts, which have held, in varying formulations, that "a violation of the duty of honesty is essential to a finding of fraud on the court." App. at 20; see *id.* at 18-20, *passim*. The circuit court made no

further mention of *Demjanjuk*, and in particular made no mention of a conflict. We submit that there is none.

In fact, in the very passage quoted by the Tenth Circuit, the Sixth Circuit in *Demjanjuk* made clear that it was not adopting a general rule for fraud on the court in private civil litigation, by carefully limiting its holding to "cases such as this one." 10 F.3d at 353. The factors distinguishing *Demjanjuk* from virtually any other type of case involving charges of fraud on the court are self-evident. First, in *Demjanjuk* the party which failed to disclose critical exculpatory information to which it had exclusive access was the United States. Second, although the underlying litigation in *Demjanjuk* was technically a "civil" denaturalization proceeding, the stakes involved not merely revocation of citizenship, but extradition to Israel to face trial on charges of mass murder allegedly committed as a guard in the Nazi death factory at Treblinka during the Second World War. These charges were capital crimes without a statute of limitations in Israel. In this *sui generis* context, the Sixth Circuit found the case controlled by *Brady v. Maryland*, 373 U.S. 83 (1963), under which "the suppression by the prosecution of evidence favorable to an accused upon request violates due process . . ., *irrespective of the good faith or bad faith of the prosecution.*" *Id.* at 87 (emphasis added) The application of *Brady* renders *Demjanjuk* irrelevant to purely private civil litigation such as this case. Recognizing the unique situation before it, the Sixth Circuit carefully avoided potential conflict with the unanimous rule in other circuits, by specifically acknowledging that "there are cases holding that a 'plan or scheme' must exist in order to find fraud on the court," 10 F.3d. at 352-53, while confining its recklessness standard to quasi-criminal "cases such as this one." *Ibid.* There is no need to resolve a "conflict" which *Demjanjuk* itself effectively avoided.

Averbach v. Rival Mfg. Co.

Petitioners also claim that the decision below in No. 93-5168, their purported "common law" action, conflicts with *Averbach v. Rival Mfg. Co.*, 809 F.2d 1016 (3d. Cir.), *cert. denied*, 482 U.S. 915, 484 U.S. 822 (1987). Once again, a key factual distinction between the cases obviates the conflict. In addition, the idiosyncratic *Averbach* doctrine which Petitioners invoke appears to have had no effect whatever on federal jurisprudence, rendering any divergence between it and the majority rule followed below academic.

In *Averbach*, the Third Circuit, alone among federal circuits which have considered the issue, held that relief from a judgment more than one year after entry need not be premised upon fraud on the court or some other extraordinary circumstance encompassed in the "savings clause" of Rule 60(b). Instead, *Averbach* allowed such relief to be sought on the basis of allegations of common law fraud asserted in a diversity action for damages triable to a jury under state law, even where the same factual allegations would be time-barred under Rule 60(b)(3)as "fraud .. misrepresentation or other misconduct of an adversary." The Third Circuit held that "the elements of a cause of action for . . . relief [from a federal judgment] in an independent action are not different from those elements in a Rule 60(b)(3) motion [based upon fraud or other misconduct of an adversary]." 809 F.2d at 1012-13. In this regard, the Third Circuit espoused a more lenient standard than did the court below, which found that the permissible grounds for an independent action for relief from a judgment filed more than one year after entry of the judgment are "considerably narrower than common law fraud," and indeed virtually indistinguishable from fraud on the court under Rule 60(b). App. at 34 n.6. Respondents regard the Tenth Circuit view on these issues, which is

unanimously supported by all other decided circuit court cases, as the correct one. However, there is no reason for this Court to address the issue in this case.

In the first place, one of the essential building blocks for the *Averbach* approach, a body of state law which would permit a common law fraud action otherwise barred by a valid extant federal judgment, is not present here. As the Tenth Circuit noted, Oklahoma has specifically rejected the notion that a common law suit may be maintained for "damages" caused by an extant adverse judgment. App. at 31 n.4. The lack of Oklahoma law supporting plaintiffs' claims clearly distinguishes *Averbach*, which predicated its allowance of relief from a federal judgment under principles of state law on its finding that the state of Pennsylvania would recognize the theory of plaintiffs' case. 809 F.2d at 1019.

In addition, the doctrinal differences between the decision below and *Averbach* would appear to be of academic interest only. Respondents' research has revealed that, while the case has been cited on other points, the unique approach to relief from judgments taken in *Averbach* has never been followed, or even discussed, by any federal court, in the Third Circuit or elsewhere, since the decision issued. All other circuits hold that equitable proceedings under Rule 60(b) provide the exclusive means of relief from judgments in the federal courts.[13] The one post-*Averbach* decision on this

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13. E.g., *Metlyn Realty Corp. v. Esmark, Inc.*, 763 F.2d 826, 833 (7th Cir. 1985)("The principles developed in the application of Rule 60(b) ... are the sole means of attack on final civil judgments."); *Villareal v. Brown Express Inc.*, 529 F.2d 1219, 1221 (5th Cir. 1976); *Vassos v. Societa Trans-Oceania Canopus*, 272 F.2d 182, 183 (2d Cir. 1959), *cert. denied*, 362 U.S. 935 (1960).

point does not mention the case, even to distinguish it.[14] Until and unless *Averbach* has some discernible influence upon other cases, there is no pressing need to address its unique features. See, e.g. *McCray v. New York*, 461 U.S. 961, 963 (1983)(Stevens, J.)(certiorari denied where issue requires "further study" in lower courts); *Gilliard v. Mississippi*, 464 U.S. 867 (1983) (Marshall, J., addressing dissent from denial of certiorari to "those of my Colleagues who . . . believe that this Court should postpone consideration of the issue until more . . . courts have experimented with substantive and procedural solutions. . .")

Lastly, for the reasons so cogently set forth in the opinions below, we submit that the decisions of the circuit court in this case were correctly decided. "Fraud on the court," virtually the only basis upon which a final judgment may be set aside regardless of the passage of time, self-evidently must be narrowly defined, unless final judgments are simply to become way stations in endless litigation of every case with a sufficiently large potential payoff. (App. at 19) Though not essential to the outcome in this case, the Court of Appeals' decision requiring a showing of a departure from the standard of honesty expected of all attorneys in cases of alleged fraud on the court is in agreement with the view of all circuits which have considered the matter in the context of private civil litigation. (*Id.* at 18, and cases cited) Plaintiffs' attempted common law end-run around Rule 60(b) was properly dismissed as doubly precluded, first by the extant valid judgment in the underlying suit, and second by the district court's comprehensive rejection of plaintiffs'

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14. *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 71 (2d Cir. 1990)(an independent action under Rule 60(b) "is not an action at law but is one addressed to the court's equity powers".)

charges of wrongdoing on the facts. Nothing in these determinations raises any issue meriting the involvement of this Court.

III. The Lower Courts are in no Need of This Court's supervision.

Petitioners conclude by portraying the federal judiciary as helpless in the face of an epidemic of fraud. *Cf.* Pet. at 20-24. This apocalyptic vision does not jibe with reality. Indeed, in each of the cases cited at page 20 of the Petition as evidencing the supposed onslaught, the court, far from being impotent, *upon proof of fraud on the court*, set the relevant judgments aside or otherwise granted effective relief. The federal courts are both alert for improper conduct, and fully capable of dealing with it appropriately.

The unique confluence of the *Brady* doctrine and Rule 60(b) in *Demjanjuk* illustrates that fraud on the court can assume varied and not always entirely predictable guises. *Aoude v. Mobil Oil Corp.*, 892 F.2d at 1118 ("Because corrupt intent knows no stylistic boundaries, fraud on the court can take many forms.") Careful yet flexible application of the federal courts' inherent powers, informed in the first instance by the district courts' experience of the day-to-day realities of litigation, is more than sufficient to cope with real, as opposed to imagined, misconduct by officers of the court.

In this case, the district court which was allegedly defrauded found no factual support whatever for the charges which plaintiffs had so long and so stridently asserted. The circuit court affirmed on the facts, agreed on the law, and properly applied principles of claim and issue preclusion to cut off plaintiffs' attempted collateral attack on the adverse judgments in the underlying case.

There was neither error in the proceedings below, nor was the outcome of importance to anyone but the battle-weary litigants. Nearly two decades after the events which set this litigation in motion, the time has finally come to apply the principle of "enough is enough."

CONCLUSION

The Petition should be denied.

Respectfully submitted.

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No. 95-650

In The

Supreme Court of the United States

October Term, 1995

HARRY ROBINSON, KAY ROBINSON, EVA MAY McCARTHY, and GEORGE SAMUEL ROBINSON,

Petitioners,

v.

AUDI AKTIENGESELLSCHAFT f/k/a AUDI NSU AUTO UNION AKTIENGESELLSCHAFT, and VOLKSWAGEN OF AMERICA, INC.,

Respondents.

AND

HARRY ROBINSON, KAY ROBINSON, EVA MAY McCARTHY and GEORGE SAMUEL ROBINSON,

Petitioners,

v.

VOLKSWAGENWERK AG and HERZFELD & RUBIN, P.C.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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There are two cases here on this Petition. *Robinson v. Volkswagenwerk*, 93-5168 in the Court of Appeals (the common law fraud suit), was decided on the pleadings alone. *Robinson v. Audi*, 92-5238 in the Court of Appeals (the independent action), was dismissed following a trial to the court under Rule 60(b). Respondents' Opposition conflates the two cases.

1. The trial court made two and only two findings. The first finding was:

> "As a preliminary matter, the court must concede that had it been apprised of the material contained in Plaintiffs' Proposed Findings of Fact and Conclusions of Law (FF/CL) filed July 27, 1992 at pp. 38-42 (nos. 53-55) the . . . exhibits at issue would most assuredly have been admitted into evidence. Indeed, it seems fair to say that if the relevant corporate relationships set forth in Plaintiffs' FF/CL, cited above had been on record, VWAG would have been joined as a party defendant. And the Court so finds." [APP. *at* 47.]

The second finding followed immediately:

> "However, nowhere in this meticulously prepared and effectively argued claim does there appear clear and convincing evidence that Defendants' counsel was involved in a 'deliberately planned and carefully executed scheme' to defraud this Court through misrepresentation and nondisclosure. In the absence of such evidence, the Court is bound by the relevant case law to deny Plaintiffs' Motion. This case is, accordingly, dismissed." [APP. *at* 47.]

The first finding has no "if true" qualifier as Respondents suggest (RESPONDENTS' BRIEF IN OPPOSITION *at* 11). Any assertion that the trial court's findings encompassed, by implication or otherwise, anything other than the factual predicate the trial judge believed was required by his understanding of what he called "the savings clause issue" of fraud on the court is belied by his own words. The trial court expressly limited his inquiry to fraud on the court:

> "Rule 60(b) provides, in part, for relief from judgment on the grounds of mistake or excusable neglect; newly discovered evidence; fraud, misrepresentation or other misconduct of adverse party *if* the action is brought within one year after the judgment is entered. It also provides a savings clause: 'this rule does not limit the power of a court to entertain an independent action . . . to set aside a judgment for fraud upon the court.' Rule 60(b). Based upon the one year rule, *this Court's inquiry will not encompass fraud and/or misrepresentation, generally, but will be strictly limited to the savings clause issue of fraud upon the Court.*" [APP. *at* 42.] [First emphasis in original; second emphasis added.]

The evidence that the trial judge found to be absent was "that Defendant's counsel was involved in a 'deliberately planned and carefully executed scheme' to defraud this court through misrepresentation and nondisclosure." Obviously, the absence of "**such evidence**" does not suggest the existence of some other evidence, but does reflect the court's understanding of the case law that he felt "bound" him to deny the plaintiffs' request to set aside the judgment.

This record *is* clear. There is no need for conjecture about what other or different finding the evidence might or might not support. There is no room to speculate as to what other things might or might not have been in the trial court's mind. In the Respondents' words, the second finding is the "dispositive factual finding" (RESPONDENTS' BRIEF IN OPPOSITION *at* 10, 12). This Petition directly challenges the legal standard which the trial court applied to that single dispositve finding.

2. It is true that, as part of our pretrial contentions in the independent action, we contended that the representations were made to the court as part of a scheme and plan to deceive the court. We believed then, and believe now, that the evidence would support such a finding. The trial judge found only that there was insufficient *clear and convincing* evidence that defendants' counsel was involved in a deliberately planned and carefully executed scheme to defraud the court through misrepresentation and nondisclosure. That ended that matter under the legal standard that the judge felt "bound" him.

But that contention was not our only contention. Indeed, the pretrial order precisely reflects the contention which we make here and the other contentions we have made from the beginning. It is found in Pre-Trial Order, Appendix E, Plaintiffs' Contentions:

> "2. Plaintiffs contend that the Defendants knew that the answers and representations were either (a) untrue, or (b) in the exercise of reasonable diligence, would be found to be untrue, or (c) made with reckless disregard for the truth, or (d) were made in the context of volunteering information which omitted to state material

> facts, which omissions made the statements materially false and misleading." [APLT.APP. *at* 152.]

The Petitioners' pleading and the pretrial contentions embraced the full range of legal possibilities from the most relaxed (*Averbach v. Rival Mfg. Co.*, 809 F.2d 1016 (3rd Cir. 1987)) standard to the most rigid standard suggested by the factual language of *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944). Indeed, the language of 7 Moore's Federal Practice §60.33 (1985), 11 Wright & Miller, Federal Practice and Procedure §2870 (Rule 60), and some dicta in the 10th Circuit reflect the conflict within that circuit as well as the nation. The confusing and different formulations in the other courts of appeal led us to wear both a belt and suspenders because in the real world alternative pleading and alternative contentions are not only allowed but often necessary. But that is, in a sense, beside the point because the conflict in the circuits is two-fold. There is conflict in regard to whether a scheme or plan is required when a lawyer is involved, but more to the point is the kind of intent or scienter that must be proven. That is where the reckless disregard standard adopted in *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993), cert. denied, ___ U.S. ___, 115 S.Ct. 295 (1994) conflicts with the kind of criminal scienter required by the 10th Circuit in this case.

We took the same approach in the common law fraud suit (93-5168) that was dismissed on the pleadings. As part of the complaint a scheme and plan was pleaded, not as the only species of fraud claimed but as one of several configurations of legal claims we believed we could prove to a jury. In addition, alternative bases for common

law fraud, including the contentions quoted above from the independent action, were pleaded. APLT.SUPP.APP. *at* 51-55. We have sought relief on every theory the factual allegations of the pleading would support. Unless as a mater of law the common law fraud suit cannot be brought until the judgment has been set aside and the standard for setting aside the judgment is the restrictive standard applied by the trial court, this pleading is viable under the standard of *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), and should not have been dismissed. That there were pleadings in the alternative is expressly allowed by Rule 8(e)(2), Federal Rules of Civil Procedure.

3. The court below itself pointed out the direct conflict with *Demjanjuk* [APP. *at* 18]. Respondents also concede with respect to *Averbach* that "In this regard, the Third Circuit espoused a more lenient standard than did the court below . . . " RESPONDENTS' BRIEF IN OPPOSITION *at* 22. There is a conflict among the courts of appeal.

Even a casual review of the cases cited in the treatises and commentaries indicate that the cases are all over the lot in regard to both the common law fraud case and the independent action. *Hazel-Atlas* is itself not clear as to whether or not the factual situation there is a sufficient, but not necessary, condition and if so, what the necessary condition is. The matter has been wrestled with for 50 years. *Hazel-Atlas* has been cited in over 250 federal cases for a remarkable variety of rules. Nobody denies that what happened in *Hazel-Atlas* must be condemned and sanctioned. But fraud, as Lord MacNaghten said: " . . . is infinite in variety; sometimes it is audacious and unblushing; sometimes it pays a sort of homage to virtue,

and then it is modest and retiring; it would be honesty itself if it could only afford it." *Reddaway v. Banham*, A.C. 199, 221 (1896). What measure of fraud upon the court is needed to protect the myriad interests at stake is an important issue of federal law that is decidedly unclear. It is likely to recur, has been recurring, and the lower courts are in disagreement about the governing principle. It is a matter of substantial public interest that goes to the very core of the operation of the federal courts as instruments of justice and the duties of officers of the court. There is no further study required in the lower courts. Certiorari should be granted.

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